

15 MARCH 1948

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Monday, 15 March 1948

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Court House of the Tribunal
War Ministry Building
Tokyo, Japan

The Tribunal met, pursuant to adjournment,
at 0930.

Appearances:

For the Tribunal, all Members sitting, with
the exception of: HONORABLE JUSTICE JARANILLA, Member
from the Republic of the Philippines, not sitting from
0930 to 1200; HONORABLE JUSTICE HENRI BERNARD, Member
from the Republic of France, not sitting from 1500
to 1600.

For the Prosecution Section, same as before.

For the Defense Section, same as before.

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(English to Japanese and Japanese
to English interpretation was made by the
Language Section, IMTFE.)

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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now in session.

3 THE PRESIDENT: All the accused are present
4 except HIRANUMA, HIROTA, MATSUI, SHIGEMITSU,
5 SAIRATORI and UMEZU who are represented by counsel.
6 The Sugamo Prison Surgeon certifies that they are
7 ill and unable to attend the trial today. The cer-
8 tificate will be recorded and filed.

9 With the Tribunal's permission the accused
10 KAYA will be absent from the courtroom the entire
11 day conferring with his counsel.

12 Major Blakeney.

13 MR. BLAKENEY: I resume on page 103, sec-
14 tion 42:

15 THE INTERCEPTED TELEGRAMS.

16 42. The story of these intercepted messages
17 may well be regarded as the brooding tragedy of the
18 Japanese-American war. "Magic", they were called;
19 but if the State Department had the advantage of
20 clairvoyance, it also did not escape the perils and
21 pitfalls attendant upon the practice of the black
22 arts. The Department of State did not know what was
23 in the Embassy's correspondence; it only thought that
24 it knew, for the intercepted telegrams which came to
25 it were, as the evidence here has shown, so garbled,

tendentiously phrased and so ineptly translated as
1 to constitute very different documents from those
2 dispatched by the Japanese Foreign Ministry. The
3 differences in the intercepted messages which fell
4 into the hands of the Department of State in Washington
5 and those actually sent by the Foreign Ministry of
6 Tokyo are of two categories: one, readily demon-
7 strable errors in the intercepts (resulting presumably
8 from poor reception or deciphering) in factual matters;
9 the other, a much less tangible but insidious distor-
10 tion of the spirit of the original messages. It was
11 by reason of this latter class of errors especially
12 that the defense considered it necessary to present
13 in evidence the originals of a few of the telegrams
14 represented in the prosecution's evidence by the inter-
15 cepted versions. This undertaking was confined to
16 production of three of such messages, three however
17 of the most vital, they being the ones conveying to
18 Ambassador NOMURA Proposals "A" and "B" and the inten-
19 tion behind them. There is no reason to suppose that
20 these examples are not typical of the entire corres-
21 pondence. I shall briefly make the comparison between
22 the two versions of each of these three, inviting the
23 Tribunal to form its conclusion, as a result of the
24 investigation, of the effect which such a condition
25

may not unreasonably be supposed to have had on the Japanese-American negotiations.

2 43. Considering these three messages chron-
 3 logically, the first is Foreign Minister TOGO's
 4 telegram No. 725 of 4 November, advising Ambassador
 5 NOMURA of the anticipated approval by the Imperial
 6 Conference of the following day of Proposals "A" and
 7 "B", and explaining the intention with which the TOJO
 8 Cabinet had determined to continue the Japanese-American
 9 negotiations. There is no factual error of consequence
 10 in the intercepted version, nor is it easy to point
 11 out a specific word or phrase which has been given a
 12 false meaning; it is the whole spirit which is wrong.
 13 One example may be mentioned. The intercepted version
 14 states that the Japanese Government "have decided, as
 15 result of these deliberations, to gamble once more
 16 the continuance of the parleys." ²⁴² As against this
 17 sporty language -- known as it is to be incorrect,
 18 the prosecution love to quote it still ²⁴³ -- the
 19 original has "the Imperial Government continues the
 20 negotiations after thorough deliberations." ²⁴⁴ It is
 21 suggested that a reading of the two documents in
 22 parallel will expose the dichotomy of the flamboyant,
 23

24 242. Ex. 1164 (Tr. 10,319).

243. Summation, §G-117 (Tr. 39,656).

244. Exhibit 2924 (Tr. 25,960).

reckless gambler whose message Messrs. Hull and Ballantine
 1 read, and the sober, responsible statesman gravely
 2 communicating with his ambassador.

3 44. The next in this series of exhibits, the
 4 Foreign Ministers No. 726 of the same day, transmitting
 5 Proposal "A" and explanation of it, illustrates our
 6 point most vividly. Let me put a few excerpts from
 7 original and intercept in parallel columns to show the
 8 grotesque distortion of the entire feeling of the
 9 message:

	245	246
	Original	Intercept
12	"This is our proposal setting	"This proposal is our re-
13	forth what are virtually our	vised ultimatum.
14	final concessions	
15	"We make the following re-	"We have toned down our
16	laxation	insistence as follows.
17	"(Note) In case the United	"(Note: Should the American
18	States inquires into the	authorities question you
19	length of the necessary dur-	in regard to 'the suitable
20	ation, reply is to be made	period', answer vaguely
21	to the effect that the ap-	that such a period should
22	proximate goal is 25 years.	encompass 25 years.)

24 245. Ex. 2925 (Tr. 25,964).
 25 246. Ex. 1165 (Tr. 10,324).

1 "In view of the strong
2 American opposition to the
3 stationing for an indefinite
4 period, it is proposed to
5 dismiss her suspicion by
6 defining the area and du-
7 ration of the stationing

8
9
10 "you are directed to abide
11 at this moment, by the ab-
12 stract term 'necessary du-
13 ration', and to make ef-
14 forts to impress the United
15 States with the fact that
16 the troops are not to be
17 stationed either permanent-
18 ly or for an indefinite
19 period."
20

"In view of the fact that
the United States is so
much opposed to our sta-
tioning soldiers in unde-
fined areas, our purpose
is to shift the regions of
occupation and our offici-
als, thus attempting to
dispel their suspicions.

"We have hitherto couched
our answers in vague terms.
I want you in as inde-
cisive yet as pleasant
language as possible to
euphemize and try to im-
part to them to the effect
that unlimited occupation
does not mean perpetual
occupation."

21 These are matters which bear, chiefly, on the
22 American impression of Japanese bad faith which so
23 largely motivated the State Department, according to
24 Mr. Bellantine. Does it perhaps put a different aspect
25 on the matter that what the Americans knew as Japan's
"revised ultimatum" was but a "proposal", and that only

1 "virtually final"? That what to Mr. Ballantine appeared
2 a maneuver to allay American suspicions -- "shifting
3 the regions of occupation and officials," whatever
4 that may be -- was the straightforward purpose to
5 define those things -- area and duration -- the in-
6 definiteness of which had long aroused American opposi-
7 tion? Suspicions well enough grounded, if such a
8 message as this had in actuality been sent by the
9 Foreign Ministry! Is there a difference between
10 allaying suspicion by employing forms of words, shift-
11 ing claims; and dismissing suspicion by giving the
12 commitment long demanded by the other party? What of
13 euphemizing, trying to "impart" in as indecisive yet
14 pleasant language as possible "to the effect that. . .";
15 is it the same as to abide by an abstract but specific-
16 ally directed term, and to "impress" the United States
17 "with the fact that. . ."? The importance of this ques-
18 tion? It was knowledge of this telegram -- knowledge
19 of the intercepted version of it, as exemplified in
20 the excerpts in the right-hand column above -- which
21 vitiated the belief of the Department of State in
22 Japanese sincerity; "Naturally," said Mr. Ballantine,
23 "we were on our guard from that point on."²⁴⁷

25 This telegram having been such a crucial point
247. Tr. 10,937.

in forming the State Department's attitude in the negotiations, let us consider also some of the errors of the other type, errors of actual fact, in it. We have seen some, already; the last two examples above relate to most important facts, the points on which the negotiations turned. Here are others:

"With regard to the principle of non-discrimination in trade, our contention hitherto made on the basis of geographical proximity is withdrawn

"Of course, there is the question of geographical proximity when we come to consider non-discrimination in commerce.

"the statement in (the United States') memorandum of 2 October to the effect that 'it would be undesirable if either the United States or Japan were to pursue one course of policy in certain areas while at the same time pursuing an opposite course in other areas.'

"In a memorandum of the American Government, they state in effect, however, that it might be feasible for either country within a certain specified area to adopt a given policy and for the other party within another specified area to adopt a complementary policy."

Especially note this one:

1 "With regard to the four 2 principles, every effort 3 is to be made to avoid in- 4 cluding them in the terms 5 of a formal agreement be- 6 tween Japan and the United 7 States (whether in the form 8 of agreement or other de- 9 clarátion) 10	"(4) As a matter of princi- ple, we are anxious to avoid having this insert- ed in the draft of the formal proposal reached between Japan and the United States (whether it is called an understanding proposal or some other sort of a statement)"
--	--

11 This paragraph in the intercepted message is
 12 given a separate number, (4), thereby making it appear
 13 coordinate with "(1) Non-discrimination in Trade,"
 14 "(2) Interpretation and Application of the Tripartite
 15 Pact," and "(3) Withdrawal of Troops." By thus seeming
 16 to be one of the main divisions of the message and
 17 cognate with the others, and by omission of the words
 18 "the four principles" and instead referring to anxiety
 19 to avoid having "this" included in the agreement, this
 20 clause of course says that the Japanese will try to
 21 escape committing themselves to a formal agreement
 22 embodying the points which they have proposed above --
 23 all of them. "Naturally," Mr. Ballantine's State
 24 Department was on its guard in dealing with anyone
 25 believed to have sent such a message as this. Of

course it was convinced of the insincerity of the
1 Japanese from reading such messages as these -- anyone
2 would be. It reads like duplicity incarnate. But this
3 was not the message sent by the Japanese Foreign
4 Ministry. Finally, for utter distortion in the ul-
5 timate degree, Section (2) on the Tripartite Pact:

6 "It should be further clar-
7 ified that Japan has no
8 intention of making any
9 unwarranted extension of
10 the interpretation of the
11 right of self-defense. With
12 regard to the interpreta-
13 tion and application of the
14 Tripartite Pact, it should
15 be stated that the Japanese
16 Government, as has been re-
17 peatedly explained in the
18 past, will act in accordance
19 with its own decision, and
20 that it is believed that the
21 understanding of the Ameri-
22 can Government has already
23 been obtained on this
24 point.
25

"At the same time that you
clarify to them that we in-
tend no expansion of our
sphere of self-defense,
make clear, as has been
repeatedly explained in the
past, that we desire to
avoid the expansion of Eu-
rope's war into the
Pacific."

1 Once more the suggestion is made, that a
2 reading of the original message discloses no ground
3 whatsoever for the suspicion of insincerity.

4 45. Last of the three telegrams available
5 for comparison is No. 735, of 5 November, from Foreign
6 Minister TOGO to Ambassador NOMURA. There is in the
7 two versions of this message only one difference worth
8 calling attention to, but that one is of considerable
9 importance in view of the prosecution's assertions of
10 the final nature of Proposals "A" and "B".

<p>11 Original²⁴⁸</p> <p>12 "It is our intention to pre-</p> <p>13 sent Proposal "B" . . . as</p> <p>14 the last resort to save the</p> <p>15 situation in case Proposal</p> <p>16 "A" fails to conclude the</p> <p>17 negotiations.</p>	<p style="text-align: right;">249</p> <p style="text-align: center;">Intercept</p> <p>12 "If it becomes apparent</p> <p>13 that an agreement cannot</p> <p>14 be reached, we intend to</p> <p>15 submit our absolutely fi-</p> <p>16 nal proposal, Proposal B"</p>
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18 Proposal "B", as we shall see later, was an
19 attempt at a modus vivendi, and as such properly and
20 accurately described as a "last resort to save the
21 situation" if negotiations for a substantive agreement
22 seemed for the moment to have broken down. It is in
23 this sense of a last-resort effort that Proposal "B"
24 is described in the succeeding paragraph of the telegram

248. Lx. 2,296 (Tr. 25,971)

249. Ex. 1,170 (Tr. 10,343)

1 as "the final proposal". This, it is submitted, is
2 a different matter from an "absolutely final proposal"
3 in the prosecution's sense of an ultimatum.

4 Assuredly, no foreign office could place any
5 trust in a Government believed to have sent to its
6 diplomatic representatives such messages as these
7 intercepts; Mr. Ballantine, in saying that, naturally,
8 the State Department had to be on guard, is guilty
9 only of understatement (which the State Department's
10 attitude toward the negotiations shows us that it was).
11 Certainly, if an ambassador came to us saying that in
12 view of our country's strong objection to his country's
13 stationing its troops indefinitely in another's ter-
14 ritory, the area and duration of the stationing were
15 therefore to be defined; but at the same time we knew
16 that secretly his Government intended, while he answered
17 us vaguely, euphemizing pleasantly but indecisively,
18 to undertake some maneuver of marching troops up the
19 hill and marching them back down again, why wast
20 breath to ask for the details? If the Ambassador said
21 that in view of our recent memorandum his Government
22 would withdraw its claims based on geographical propin-
23 quity, while however his Foreign Minister had told him
24 that our memorandum could and would be interpreted
25 in a sense opposite to its meaning, and the claims

1 thereby justified, might we not well question whether
2 some ulterior meaning lay concealed in the words of
3 his proposal? And if he came offering to make an
4 agreement with us on specified points, but we knew
5 the while that he was directed to make every effort
6 to avoid entering into a commitment of the agreement
7 to writing, could we retain much belief in the Amba-
8 sador's protestations of sincerity, his or his Govern-
9 ment's? Being in possession of these messages, we
10 should naturally, as Mr. Ballantine said, have to
11 "take them into consideration".²⁵⁰ It would be foolish
12 to pretend that we could do otherwise.
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1 46. This knowledge, or half-knowledge, of
2 the contents of the Japanese diplomatic communications
3 was acquired, the prosecution say, "by the watchful-
4 ness, sagacity and hard work of the intelligence ser-
5 vice of the United States."²⁵¹ Perhaps one may won-
6 der whether it was, after all, sagacity; whether it
7 was not perhaps better described, in the Oriental
8 phrase, as "monkey-wisdom", the cunning that defeats
9 itself. Is it sagacity, which in the discarding un-
10 heeded of every proposal, every promise of an under-
11 taking, never allows to the other party the chance
12 to put his sincerity to the proof? How shall it be
13 said that Japan was insincere in her proposed commit-
14 ments, when they were never tested? Just what part
15 this knowledge sagaciously gained played in the American
16 decisions, to what extent it governed the spirit in
17 which she approached the Japanese-American negotiations,
18 it is not possible to know. But we can draw some sig-
19 nificant conclusions from the evidence in this case.
20 America's ambassador in Tokyo, Mr. Grew, was kept
21 fully informed concerning the negotiations, and in a
22 collateral way participated in them. Mr. Grew, of
23 course, was not intercepting any telegrams; hence he
24 had no clairvoyant sagacity, but only that with which
25 (251. Summation, BG-152, T. 39700)

his ability, experience and judgment equipped him.

1 As we shall have seen before we quit this subject,
 2 Ambassador Grew on more than one occasion urged upon
 3 his government--at least once enthusiastically--the
 4 wisdom of giving Japan an opportunity to prove whether
 5 her professed desire to establish a reorientation was
 6 sincere.²⁵² The Department of State did not accept
 7 his advice, nor apparently did the British Government
 8 urge it to do so, in reliance upon the advice of its
 9 own ambassador, Sir Robert Craigie, in accord with
 10 Mr. Grew's.^{252a}
 11

12 Or consider a specific case in which we can
 13 almost see the influence of the intercepted corres-
 14 pondence at work. When Ambassador NOMURA presented
 15 Proposal "A", it will be remembered, Secretary Hull
 16 had approved the clause concerning non-discriminatory
 17 trade.²⁵³ That was on 7 November. Normally the inter-
 18 cepted telegrams were received in the State Department
 19 within a day or two of translation,²⁵⁴ and the explanation
 20 of Foreign Minister TOGO to Ambassador NOMURA of
 21 Proposal "A" had been translated on the 4th; but from
 22 (252. Exs. 2836, T. 25368, 2896, T. 25805;
 23 testimony of Ballantine, T. 10888)
 24 (252a. Ex. 2908, T. 25847)
 25 (253. Supra, §26
 (254. Testimony of Ballantine, T. 10951)

his reaction on the 7th the Secretary had apparently
not yet seen this one. A few days later, and he was
raising objections and suggesting the withdrawal of
that part of the Japanese proposal which went beyond
the earlier American position.²⁵⁵ Can there be any doubt
that in the interim he had learned that, as it appeared
to him, Foreign Minister TOGO had stated that the ques-
tion of geographical propinquity had still to be con-
sidered, despite the language of Proposal "A", and
that Japan was going to pretend that Secretary Hull's
words in his oral statement of 2 October that it would
be undesirable if either government "were to pursue
one course or policy in certain areas while at the same
time pursuing an opposite course or policy in other
areas" could be construed to mean that "it might be
feasible" for one country to adopt a given policy
within a certain area while the other adopted a "com-
plementary" policy in another area? How different
might not have been the course of history had Japan
been given, as Ambassador Grew urged, an opportunity
to "implement" her proffered commitments!

THE INDO-CHINA QUESTION

47. Questions arising out of Japan's move-
ment into southern French Indo-China in July 1941
(255. Supra, §26)

provided from that time a fourth question of major
1 interest in the Japanese-American negotiations.²⁵⁶ This
2 Indo-China issue may, indeed, be regarded as one of
3 paramount importance in that it ruptured the negotia-
4 tions for a time, induced American suspicion of sub-
5 sequent Japanese professions of peaceful intent, and
6 contributed to the American decision to rupture econ-
7 omic relations, a step which as the Tribunal has seen
8 from the evidence at least hastened the coming of war.
9

10 When the Japanese-American negotiations opened
11 Japanese troops were already stationed in the northern
12 areas of French Indo-China, under agreement entered
13 into in September 1940 with the Government of France.²⁵⁷
14 The Indo-China question seems, however, not to have
15 come up (unless in connection with equality of access
16 to resources) in the Washington negotiations until
17 almost a year later, when the further Japanese advance
18 into the southern part of the colony was made under the
19 agreement with France for joint defense.²⁵⁸ With the
20 reasons for this move and the details of its accom-
21 plishment we are not especially concerned here; of
22 the reasons assigned--that it was a precautionary
23 measure against such an encirclement of Indo-China
24

25 (256. Testimony of Ballantine, T. 10862)

(257. Ex. 620, T. 6829)

(258. Ex. 651, T. 7079)

as would menace Japan's economic existence, and a
1 measure for prosecution of the China Affair--the lat-
2 ter seems perhaps to have been the chief, for it was
3 more emphasized in the conversations ²⁵⁹ (and also had
4 accounted for the original stationing of troops in
5 Indo-China, in 1940). Our concern, however, is with
6 the effect of the move on Japanese-American relations
7 and the negotiations.
8

9 The French and Japanese Governments had
10 reached an agreement about 20 July 1941 for the occu-
11 pation of certain bases in southern Indo-China. ²⁶⁰ From
12 5 July rumors of such a move had been afloat; on that
13 day the State Department had called in Ambassador
14 NOMURA and pointed out the harmful effect upon the ²⁶¹ the
15 negotiations then in progress of such a move. The
16 agreement with France was nevertheless executed, and,
17 "feeling keenly the strained situation", Ambassador
18 NOMURA obtained an interview with President Roosevelt
19 on the 24th, at which time the President warned him
20 that if the move into southern Indo-China was carried
21 through, it would probably be unavoidable for him to
22 impose an oil embargo on Japan. ²⁶² The President
23

24 (259. Exs. 2883, T. 25753, and 2891, T. 25784)

(260. Ex. 647-A, T. 7058)

25 (261. Memorandum, Ex. 2879, T. 25731)

(262. Memorandum, Ex. 2882, T. 25750)

1 continued with the suggestion that it might be possible
2 to withdraw the Japanese troops then stationed in Indo-
3 China if the area could be neutralized by agreement
4 and its resources made freely and equitably available.
5 The final protocol for joint Franco-Japanese defense
6 of Indo-China was executed and Japanese troops moved
7 in only on 29 July; on the 26th, however, as a pro-
8 fessed counter-measure to execution of the agreement
9 of the 20th, President Roosevelt by executive order
10 froze all Japanese assets in the United States (Bri-
11 tain and the Netherlands followed suit)²⁶³. The President
12 had told Ambassador NOMURA, at the meeting of the 24th,
13 that he had been able theretofore to resist on the
14 ground of maintaining the peace of the Pacific, the
15 strong public sentiment for embargo on the export of
16 petroleum to Japan but that the move into southern
17 Indo-China would deprive him of his justification.
18 In view of this, it is interesting to note that on 2
19 July, more than three weeks earlier, and three days
20 before the State Department had heard the rumors of
21 the Indo-China move, the Japanese Embassy had already
22 "recently" heard rumors that the freezing of assets
23 was under contemplation, or had been decided on, by
24 the State Department²⁶⁴.
25

(263. Testimony of Ballantine, T. 10762)

(264. Memorandum, Ex. 2280, T. 25739)

48. As a consequence of the Indo-China move
and the rupture of economic relations by the American
freezing order of 26 July, negotiations languished for
some weeks. The United States, feeling that Japan's
action in making the southward advance was menacing,
and was inconsistent with her professed purpose of
working for a comprehensive peaceful settlement of
Pacific problems, had on the 23d (through the Acting
Secretary of State) advised Japan that she could see
no basis for pursuing further the conversations which
had been in progress.²⁶⁵ However, the receipt by Ambassa-
dor NOMURA on 6 August of a new Japanese suggestion,
in the form of an answer to the President's proposal
of 24 July of neutralization of Indo-China, gave him
the opportunity to make another approach, which he
accordingly did, presenting the proposal to Secretary
Hull on the same day.²⁶⁶ It amounted to a rejection
of the President's suggestion, comprehending instead
mutual undertakings of cooperation for the obtaining of
the resources required by the two nations; and a Jap-
anese undertaking of no further stationing of troops
in the Southwestern Pacific except Indo-China, whence
the troops already dispatched would be withdrawn upon
(265. Testimony of Ballantine, T. 10760)
(266. Telegram, NOMURA to TOYODA, Ex. 2886, T. 25765)

1 the settlement of the China Incident, to be balanced
2 by an American undertaking to suspend military measures
3 in the South Pacific and to advise the British and
4 Netherlands Governments to do the same. The United
5 States was to "recognize a special status of Japan in
6 French Indo-China ever after the withdrawal of the
7 Japanese troops from that area." ²⁶⁷ Mr. Hull, the
8 Ambassador reported, promised to give an answer after
9 full study, but seemed little interested.

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23 (267. Ex. 2885, T. 25760)
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1 The negotiations continued to lag, until on
2 17 August Ambassador NOMURA had a meeting with Presi-
3 dent Roosevelt, upon the latter's return from his meet-
4 ing at sea with Prime Minister Churchill, at which time
5 the President conditionally approved the resumption
6 of negotiations. The Ambassador had made the new sug-
7 gestion that a meeting be arranged between the Presi-
8 dent and the Premier of Japan, "to make an exchange of
9 views with an eye to the general peace of the world." 268
10 The President, according to the Ambassador's report,
11 discussed various aspects of such a meeting with much
12 apparent interest; but of course gave no answer at that
13 time. He did hand to the Ambassador two oral state-
14 ments: one was a serious warning to Japan that America
15 would be compelled to take all steps which it might
16 regard as necessary "if the Japanese Government takes
17 any further steps in pursuance of a policy or program
18 of military domination by force or threat of force of
19 neighboring countries." 269 The other document was in
20 reference to the proposed meeting of the heads of state.
21 It said that

22 "In case the Japanese Government feels that
23 Japan desires and is in position to suspend its
24

25 268. Telegram from NOMURA to TOYODA, ex. 2888 (Tr.
at 25,778).

269. Ex. 2890 (Tr. at 25,783).

1 expansionist activities, to readjust its position,
2 and to embark upon a peaceful program for the Pacific
3 along the lines of the program and principles to which
4 the United States is committed, the Government of the
5 United States would be prepared to consider resumption
6 of the informal exploratory discussions which were
7 interrupted in July and would be glad to endeavor to
8 arrange a suitable time and place to exchange views." 270

9 However, the Japanese Government should
10 "furnish a clearer statement than has yet been fur-
11 nished as to its present attitude and plans."

12 The proposed meeting of President and Premier
13 proved the topic for a considerable amount of dis-
14 cussion subsequently, but for the time being we need
15 not deal with the matter. Meanwhile, the suggestion
16 made by President Roosevelt on the 17th brought a
17 Japanese reply, which was delivered to the President
18 at a meeting of 28 August in the form of a statement
19 later referred to as "assurances." 271 This contained
20 a variety of general statements of Japan's intentions,
21 including explanation of the reason for Japanese
22 measures in Indo-China in much the same terms as those
23 theretofore given on various occasions.

25 270. Ex. 2889 (Tr. at 25,781).

271. Ex. 1245-B (Tr. 10,764).

1 On 6 September was delivered the Japanese
2 counterproposal designed to reopen the negotiations.
3 The clause relative to Indo-China provided

4 "that Japan will not make any military advance-
5 ment from French Indo-China against any of its adjoin-
6 ing areas, and likewise will not, without any justi-
7 fiable reason, resort to military action against any
8 regions lying south of Japan."²⁷²

9 This, it will be remembered, was the proposal
10 which had been handed to Ambassador Grew beforehand,
11 and on which he had sent to the State Department his
12 opinion.²⁷³ Of the clause in the proposal relating
13 to Indo-China, as of those concerned with China and
14 with the Tripartite-Pact question, Ambassador Grew felt
15 that "the commitments contained in the latest Japanese
16 proposal, if implemented, would fulfill" the basic
17 requirements of a satisfactory solution of the Pacific
18 problems. Mr. Hull, however, as will be recalled,
19 felt that the proposal as a whole had "narrowed down
20 the spirit and scope of the proposed understanding."²⁷⁴

22 49. The proposal by Japan of 25 September
23 introduced a new idea into the negotiations over the
24 Indo-China question, one carried over into proposal "A"

25 272. Ex. 1245-D (Tr. at 10,779).

273. Supra, §33.

274. Memorandum, Ex. 2898 (Tr. at 25,815).

of November:

"The Government of Japan will not make any armed advancement, using French Indo-China as a base, to any adjacent area thereof (excluding China), and upon the establishment of an equitable peace in the Pacific area, will withdraw its troops which are now stationed in French Indo-China."²⁷⁵

The new thing in this proposal is the provision for withdrawal upon conclusion of "an equitable peace" in the Pacific area (new in a formal proposal for agreement; it had first appeared in the "assurances" of 28 August). Mr. Ballantine says that "that additional clause, added nothing to the situation. It would have been the same whether that clause had been added or not";²⁷⁶ the prosecution dismiss it as involving "no concession, because Japan was already committed to France under their agreement to this proposal."²⁷⁷ Before dealing with these arguments, let us just see to the extent that it is not self-evident, the meaning of this "equitable peace" as it is used here. The explanation had been given on 28 August, in a telegram of explanation to Ambassador NOMURA of

²⁷⁵. Ex. 1245-E (Tr. at 10,790).

²⁷⁶. Tr. 10,933.

²⁷⁷. Summation, SG-120 (Tr. 39,661). It might be noted that the author of this passage in the summation was discussing this clause in proposal "A" of 7 November.

1 the "assurances." "It is implied in the phrase 'when
2 an equitable peace has been established in the Far
3 East,'" he wrote, "that the withdrawal of Japanese
4 troops can be considered even while the China Affair
5 is not yet brought to a general settlement, if the
6 Chiang Kai-shek regime descends literally to a local
7 government owing to the closing of the supply routes,
8 normal relations between Japan and China are in effect
9 restored, and equitable and free acquisition of
10 resources from French Indo-China is assured to Japan." 278

11 Japan, then, had come to the point of willing-
12 ness to abandon the contention which had been made ever
13 since the advance into southern Indo-China, that the
14 troops must be stationed there to see the China Affair
15 through. Taking this clause in conjunction with item 6
16 of the "basic terms of peace with China" annexed to
17 the 25 September proposal, calling for fusion of the
18 Chiang Kai-shek and Wang Ching-wei governments, 279
19 there seems to be some relaxation of that insistence.
20

21 To deal, however, with Mr. Ballantine's and
22 the prosecution's arguments that this clause contains
23 nothing new. A passage from the cross-examination of
24 Ballantine will make his, and the defense's, positions

25 278. Ex. 2920 (Tr. at 25,944).
279. Ex. 1245-F (Tr. at 10,794).

quite clear.

"Q . . . I will ask you this, whether the 25 September proposal by the Japanese did not contain the new offer, now first made, to withdraw all troops . . . from Indo-China upon either the settlement of the China Affair or the establishment of an equitable peace in the Pacific?

.

"A The new point there was an equitable peace in the Far East. I don't think that adds anything whatsoever to the other thing, because you couldn't have an equitable peace in the Far East without a settlement of the China Affair. Also, the term "equitable" -- who is to decide which is to be equitable? It was (clear by) implication that that was to be unilaterally determined by Japan." 280

To interrupt a moment. How is this clear? No such thing is suggested. Of course, Mr. Ballantine has dogmatically made his unilateral interpretation, in the second sentence of his answer -- it cannot be equitable without settlement of the China Affair. Dogmatically, but -- as he would have noted had he read the documents in the negotiations -- incorrectly.

"Q Was it not understood by the Department of 280. Tr. 10,931-32.

1 State that the conclusion of this agreement which was
2 then under discussion would be considered by the
3 Japanese to be an equitable peace in the Pacific?

4 "A We hadn't reached any meeting of minds
5 at all on the fundamental principles which were to
6 govern the peace in the Far East.

7 "Q I understand that perfectly. But my
8 question is not that. Was it not the clear understanding
9 throughout these conversations, on both sides, that
10 if the conversations eventuated in an agreement, that
11 agreement would constitute the consummation of the
12 equitable peace in the Pacific?

13 "A Of course, that is true, but that phrase,
14 that additional clause, added nothing to the situation.
15 It would have been the same whether that clause had
16 been added or not." 281.

17 Did not the witness know that a term of every
18 proposal for agreement, without exception, had been
19 that through the good offices or the "introduction,"
20 or by request to Chungking, of the United States nego-
21 tiations for peace between Japan and China were to ensue
22 upon the conclusion of the agreement? The agreement
23 will, when executed, start off peace negotiations;
24 such an agreement will, "of course," constitute "an
25 281. Tr. 10,932-33.

equitable peace" -- with the China Affair still
1 unsettled, despite Ballantine's "it couldn't be."
2 "Upon settlement of the China Affair" and "Upon estab-
3 lishment of an equitable peace, which includes the
4 initiation of negotiations for settlement of the China
5 Affair" are not, pace Mr. Ballantine, synonymous.
6

7 As for the prosecution argument that, Japan
8 being already committed to France, the agreement to
9 withdraw troops upon conclusion of the China Affair
10 or conclusion of an equitable peace in the Pacific
11 area does not amount to a concession, there are several
12 answers. We might remind learned counsel that in the
13 common law it is not unfamiliar doctrine that the
14 promise to one to do that which one is bound to another
15 to do may be such consideration as will sustain an
16 enforceable contract. In any event, the promise to do
17 something other than what one is bound to do raises
18 no such question; and that is the condition here. The
19 evidence concerning the terms upon which the Japanese
20 troops were stationed in Indo-China is far from clear
21 in the record here; but so far as appears there is
22 in all of it no obligation undertaken by Japan to
23 France to withdraw the troops dispatched to Indo-
24 China upon settlement of the China Affair, or upon
25 establishment of an equitable peace in the Pacific, or

1 upon other terms specified. Until the demonstration
2 is made of what Japan was bound to France to do, the
3 value of her offer to America to withdraw upon specific
4 contingencies is unimpaired as consideration or quid
5 pro quo for the counterundertakings.

6 50. Negotiations went desultorily on, with
7 no notable progress, into November. Proposal "A" had
8 only one difference in the Indo-China section from the
9 25 September draft -- the proviso that "The Japanese
10 Government undertakes to guarantee the territorial
11 sovereignty of French Indo-China." Although this
12 language may not be without a certain significance --
13 a "guarantee" is offered, where before had been
14 assurances -- we need not be concerned to dwell on it.
15 For the next development in the Indo-China matter
16 was to be revolutionary. This was its treatment in
17 proposal "B", and it is therefore deferred until we
18 come to analyze that document.

19 SUMMARY: THE NEGOTIATIONS TO PRESENTATION
20 OF PROPOSAL "B."

21 51. Our analysis of the evidence having
22 now reached the point where efforts directed toward a
23 definitive settlement were suspended, it may be help-
24 ful if before considering the further discussions over
25 a modus vivendi we attempt to summarize the conclusions

1 which can be drawn from negotiations from April through
2 proposal "A."

3 The prosecution wish to consider that the
4 Japanese-American negotiations commenced with the
5 appointment of Admiral NOMURA as Ambassador to Washing-
6 ton (which was in November 1940).²⁸² At any rate, in
7 February -- on the same day that the Ambassador was
8 for the first time being urged by President Roosevelt
9 to undertake negotiations -- Foreign Minister MATSUOKA
10 sent him instructions in which he was reminded that his
11 function was to gain American understanding for Japan,
12 ending with the statement that to those who understood
13 her Japan would make even illogical concessions.²⁸³
14 And when the negotiations eventually got under way,
15 even in the days of the KONOE Cabinet there were
16 various concessions made by Japan.

17 52. The changes in Japan's position on the
18 three chief issues of the negotiations were, while the
19 KONOE Cabinet remained in office, briefly as follows.
20 In the matter of interpretation of the Tripartite-
21 Pact obligation in relation to the American interpre-
22 tation of the right of self-defense, Japan had receded
23 from her original stand that her obligations would be
24

25 282. Summation, SG-58 (Tr. 39,586).

283. Ex. 1045 (Tr. 9804).

1 applied "in accordance with the stipulation of article
2 3" of the pact to the point of giving assurance that
3 should America participate in the European war Japan
4 would "decide entirely independently in the matter of
5 interpretation" of her obligation. Japan had also
6 agreed to insertion in any agreement of a provision
7 that "both governments will be guided in their conduct
8 by considerations of protection and self-defense."

9 Mr. Hull had shown sufficient approval of this step to
10 encourage Ambassador NOMURA to report, and the author-
11 ities in Tokyo to believe, that agreement in principle
12 had been reached on the Tripartite-Pact question.

13 The question of economic activities had once
14 been completely settled, by Japanese concession of the
15 American position, though later the positions of the
16 parties moved apart again. The only real question
17 here was whether the agreement for non-discriminatory
18 international commercial relations was to be restricted
19 to the "southwest Pacific area" of the original Japanese
20 draft of May, or to the "Pacific area" as demanded by
21 the United States. Japan made the concession, and by
22 21 June the identical language stood in the parties'
23 drafts on this head. Later, however -- with presenta-
24 tion of the Japanese proposals of 6 September -- the
25 "southwest" again intruded into the negotiations, and

1 the position reverted substantially to what it had
2 been four months earlier, there to remain until October.

3 The third and crucial point, the question of
4 withdrawal of Japanese troops from and stationing them
5 in China, showed little progress during this period.
6 Many discussions had resulted only in making it certain
7 that the United States would not be content with any
8 Japanese commitments which did not undertake unequivocally
9 the limitation of the period and areas of
10 stationing the troops; until Japan could see her way
11 to agreeing at least to the principles which America
12 felt must govern her relations with China, the whole
13 matter remained only "subject to further discussion."
14

15 53. It was, however, with the first fruit of
16 the TOJO Cabinet's undertaking to reconsider the
17 situation in the negotiations -- with proposal "A" --
18 that Japan made the first really significant concessions.
19 It is submitted that analysis of the evidence
20 proves to demonstration that here and henceforth Japan
21 made not only concessions on every point, but repeated
22 and extreme concessions.

23 Of these the slightest were those in connection
24 with the Tripartite-Pact question, as is natural in
25 view of the fact that it was felt (and not, evidently,

on the Japanese side alone)that it had been all but
1 settled. Proposal "A" represented on its face no
2 significant change in the Japanese position -- that
3 Japan had "no intention of making any unwarranted exten-
4 sion of the interpretation of the right of self-defense,"
5 and that in interpreting the Tripartite Pact she would
6 "act in accordance with" her own decision. Yet there
7 is a significance in this language which escapes one
8 who would idly read old documents without relating
9 them to the events of their day. In the summer months
10 of 1941 American military preparations and measures
11 had prodigiously increased, were indeed increasing in
12 algebraic progression daily; and only in the month
13 before the TOJO Cabinet took office and commenced its
14 lucubrations over relaxed terms for the negotiations --
15 in September 1941 -- the United States had taken those
16 steps which, however equivocal its previous acts, in
17 fact and in law brought the nation into a state of war
18 with Germany.²⁸⁵ Germany and Italy had been warned that
19 their naval vessels ventured into the Atlantic at their
20 peril; the American Navy's orders were to shoot on
21 sight; American vessels were sinking and were being
22 sunk in North and South Atlantic; and President

284. Ex. 2894 (Tr. 25,798).

285. Defense Summation, Section "E," "On Some Question of International Law," §14, supra. (Tr. 42,431)

1 Roosevelt had recognized it to be "a shooting war,"
2 and had armed American merchant vessels. ²⁸⁶ Japan's
3 commitment to make her own decision of the character
4 of America's acts, to adjudge their self-defensive
5 character or otherwise, in this context take on an
6 utterly different meaning from what they had had before.
7 No matter if the identical words had been used, before,
8 a thousand times -- now they were to be understood
9 in a new state of facts. If America had already,
10 before proposal "A" was handed over on 7 November,
11 gone to war against the European Axis members; if
12 Japan, knowing full well of this, had not attacked
13 America -- is it not plain that the language of
14 proposal "A" is the assuagement to the old American
15 doubt? "Your entry into the European war, although an
16 unprecedented extension of the right of self-defense,
17 we will concede to be a proper extension; we interpret
18 the Tripartite Pact as imposing no obligation on us in
19 the circumstances," it says as plain as day. Of
20 course, this could not be put into words quite so
21 baldly. The Tripartite Pact was there, and even in
22 the new orientation contemplated by the agreement with
23 the United States it had to be paid lip-service. Had
24
25 286. Seventy-eighth Congress, 2d Session, Events Lead-
ing Up to World War II (1945), 296-301 passim.

Japan been willing to repudiate the pact entirely

(which however the United States had always professed not to require), her so doing would scarcely have been calculated to instill confidence into American breasts concerning the value of their agreement with Japan.

At any rate, she showed a clear willingness effectively to reduce the pact to a dead letter. Ambassador NOMURA blurted it out -- "I ask you to 'read between the lines'" -- then, realizing his diplomatic faux pas,

retracted; but he would never have said it had he not known his government's intention (this sentence too was part of what he said "under instruction from his government").²⁸⁷ Nor would Ambassador KURUSU, after his arrival,

have been talking so enthusiastically about arriving at a Japanese-American agreement so splendid that it would "outshine" the Tripartite Pact. What is conclusive is the letter which Ambassador KURUSU offered to sign and hand to Secretary Hull, on 21 November.^{287a}

Mr. Hull regarded it as of no importance (why we can only surmise). But whatever the reason, it is the fact that Japan was willing, as a part of the agreement with the United States which was to

287. Memorandum, ex. 2927 (Tr. at 25,975).
287a. This matter, although not in fact a part of "the negotiations to the presentation of proposal 'B,'" as a continuation of them raising no new question may be conveniently disposed of here.

1 "outshine" the Tripartite Pact, to consent to publica-
2 tion of a letter from her Ambassador containing the
3 statement that "Japan is in a position to interpret
4 its obligation freely and independently and is not to
5 be bound by the interpretation which the other high
6 contracting parties may make of it." With this pub-
7 lication the Tripartite Pact would in very truth have
8 become a dead letter! Japan's concession in this
9 matter had here reached, it is submitted, the point
10 almost of repudiating the pact in words.
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54. Secondly, there is the question of economic activities, that which had once before been agreed, then disagreed over. This point, too, however, was as a result of Ambassador NOMURA's report to that effect, regarded as substantially settled.

Mr. Hull, however, had a hobby, for which his name was famous throughout the world -- promoting the idea of free trade among nations. As the evidence discloses, it was his custom frequently to deliver little homilies on this subject to the Japanese Ambassadors, when the conversation turned away from the complexities of the China question, pointing out to them the extent to which he had succeeded in persuading the nations to adopt his principles. What more natural, then, than that the Japanese Government, striving to go as far as possible for agreement in accepting his proposal to widen the scope of the agreement for nondiscriminatory commercial relations to the entire Pacific, propose its extension to the entire world? What more natural, except his delight, which he happily expressed to Ambassador NOMURA upon first reading of the proposal? So thus it stood, in proposal "A": Japan "recognizes the principle of non-discrimination in international commercial relations to be applied to all the Pacific areas, inclusive of

1 China, on the understanding that the principle in
2 question is to be applied uniformly to the entire
3 world as well." Afterthought, it is true, there was --
4 would such a condition bind the contracting nations
5 to control the conduct of third powers? Assurance
6 that no such absurdity was intended was quickly forth-
7 coming, whereupon Mr. Hull seems to have been content
8 on this point. Well may he have been, Japan conced-
9 ing, as she did, not only the narrow point involved
10 in the draft proposal but the broad principle the
11 application of which to and by all nations of the
12 world was Secretary Hull's most cherished ambition.

13 55. But it is in the matter of the withdrawal
14 of Japanese troops from China that we are compelled to
15 recognize the really basic concessions made by Japan.
16 To remind ourselves: the questions involved in this
17 point looked like this:

18 1) When will the general withdrawal take
19 place after restoration of peace?

20 2) As to troops to remain stationed in
21 China after restoration of peace,

22 a) In what areas will they be stationed?

23 b) When will they be withdrawn?

24 c) How many of them will there be?

25 It is our submission that, considering this

1 little cluster of questions as a whole, or regarding
2 severally the parts which together equal that whole,
3 there is every confirmation that the defendants have
4 spoken with sincerity as well as with exact truth
5 when they have testified that Proposal "A" represented
6 extreme concessions. It must be remembered that
7 Proposal "A" was not a complete redraft, and that
8 the document which Ambassador NOMURA handed to
9 Secretary Hull on 7 November and to the President on
10 the 10th is not the whole of it. Proposal "A" con-
11 sists of that document; of the last complete draft
12 proposal, that of 25 September; and of those additional
13 things which the Ambassador was authorized to put into
14 the form of agreement when one was reached. All
15 these must be considered together when we speak of
16 Proposal "A." We must not forget, also, the very
17 curious circumstances, that although Secretary Hull
18 did not ask the questions which would have brought out
19 the additional points in the Ambassador's instructions,
20 he knew of them. Above all, let it be remembered
21 always that the Americans had been insisting on some
22 definite commitments from the Japanese on such matters
23 as principle as would negative the intent imputed to
24 them of maintaining an overlordship of China.
25

56. Taking up the list of questions above,
1 we find that part of Proposal "A" relative to 1) to
2 represent a total concession to the American position.
3 The United States had for a few months been suggest-
4 ing that a two-year limit be placed on the general
5 withdrawal of troops after restoration of peace;
6 Proposal "A" contains the undertaking that "such
7 forces will commence withdrawal as soon as general
8 peace is restored between Japan and China, and the
9 withdrawal will proceed according to separate arrange-
10 ments between Japan and China and will be completed
11 within two years with the firm establishment of peace
12 and order." Two years, the American suggestion;
13 there can be no doubt about this point, at all
14 events; it is a concession, made for the first time.

16 The next point, 2)a), is the one which of
17 all gives least support to our position -- but, at
18 the same time, it is one which seemingly gave rise
19 to as little concern as any in the negotiations.

20 Never during the negotiations had the exact
21 areas in which troops were to be stationed been
22 specified; the matter had always been one of those
23 "subject to further discussion," and it was assumed
24 throughout that when agreement drew near the details
25 of this matter would have to be grappled with.

1 Proposal "A" still does not particularize on this
2 question. "North China, Inner Mongolia, Hainan
3 Island" is all the detail given. The objection of
4 the Americans was (which was perfectly true) that
5 this was the first mention, in a formal proposal,
6 of Hainan; which somehow, in their eyes, vitiated
7 the entire proposal. The matter seems hardly so
8 important as the State Department suggested, for
9 several reasons. First -- if it matters -- the State
10 Department had had knowledge for months that Hainan
11 was one of the points where it was desired to leave
12 troops stationed. More important is the psychological
13 aspect of it -- that this part of Proposal "A" actually
14 represented a concession, made for the first time, from
15 the extremist demands which had never before been
16 waived. Had agreement become so probable, at any time
17 in the preceding months, that these areas were to be
18 specified, they would (as the State Department knew)
19 have included these three, and more; and the State
20 Department might have considered the possibility that
21 the fact that this concession could be made was sympto-
22 matic of a spirit which, given encouragement, might
23 have resulted in concession to unpredictable lengths
24 for the sake of agreement. It was as true in November
25 as in February that Japan would, quite without regard

1 to logic, make the concessions to those who showed
2 understanding. At any rate, for argument let us
3 agree with the State Department that the inclusion
4 of Hainan was a retrograde step, and investigate the
5 remainder of Proposal "A."
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Our 2)b) is a most interesting point. Mr. Hull had always expressed himself most strongly about the indefinite period of the proposed troop-stationing; the matter of numbers was seldom discussed, and concerning areas he merely showed disapproval of their being "large." But on the time question he was firm; there must not be even that which gave the appearance of permanent stationing or -- which amounted to the same thing -- indefinite stationing; there must be a definite time-limit fixed. As we know, Japanese Government and High Command had at last, with the approval of Proposal "A", come to an agreement that the principle of a time-limit should be accepted. This was assuredly the high dramatic moment of the negotiations; for with that principle admitted by Japan, no matter how difficult might be the working out of the details, no matter how long the time that it might consume, agreement was within sight. Proposal "A" did not express this principle on its face. As we have seen, the Ambassador was given additional instructions for supplementing it, and his instructions on this point were, while making it clear that no longer was indefinite stationing proposed, to here if possible to the generalized term which had theretofore throughout the negotiations been used to express the term of the troop-stationing -- "a certain required duration." But he was

1 told, if the American Government asked, he was to mention
2 twenty-five years as an "approximate goal." It may well
3 be that twenty-five years was too long (though the State
4 Department has never, down to and including this trial,
5 suggested so); but if so, that was a promising place to
6 enter for negotiation. Willingness at long last to
7 abandon the claim to indefinite rights, to agree to a
8 time-limit at all, suggests a willingness to negotiate
9 over the limit. Again, Secretary Hull knew from the
10 Ambassador that it was Japan's intention to recognize
11 the principle of limiting the time of stationing; and,
12 it will not be forgot, although he did not inquire about
13 the length of time, he knew; he knew that the principle
14 w at last accepted. He knew, even, the time-limit
15 which Japan would propose to start bargaining. This he
16 knew, and could have had no doubt, because he had read
17 Ambassador NOMURA's correspondence, which even in the
18 "Magic" version made so much clear.

19 Where before she had always stood firm, on the
20 most vital point of them all, Japan yielded. Was it no
21 concession?

22 Lastly, 2)c)is certain. The American officials
23 had, so far as appears from the evidence, never had any
24 commitment from the Japanese concerning the number of
25 troops to remain in China. It is, of course, possible

1 to take the view that now, with the principle of with-
2 drawal accepted, it was unnecessary to consider this
3 question. Nevertheless, within a few days after the
4 presentation of Proposal "A", Ambassador NOMURA was
5 asked -- the only aspect of this all-important **matter**
6 which elicited any inquiry -- and readily gave the reply
7 that "possibly 90 per cent would be withdrawn." I press
8 the point again; ten per cent may, or may not, have been
9 an excessive remainder; but the State Department did not
10 suggest that, the State Department did not in fact dis-
11 cuss the matter at all. Was it no concession that Japan
12 was for the first time in the negotiations ready and
13 willing to discuss the practical details of numbers of
14 troops?

15 57. There is a passage in the evidence, in
16 relation to Proposal "A", which we may use in summation
17 of this point. It is Mr. Ballantine speaking. He has
18 been asked for the State Department's attitude toward
19 one of the points above -- the reasonableness of the
20 twenty-five year limit on troop stationing.

21 "A We didn't consider each of these small
22 points individually. We considered the proposition as a
23 whole.

24 "Q I do not quite understand how you consider
25 it as a whole without considering details; but

1 considering it as a whole, did you consider the 25-year
2 period to be unreasonable?

3 "A That would have to be taken into consider-
4 ation with the other elements in the situation -- the
5 total number of troops and the places where they are to
6 be stationed, and so forth." 288

7 To this day I do not understand how one con-
8 siderers the whole without noticing the parts. "Small
9 points"? Failure to resolve them in half a year of
10 negotiation led to war. One must take into consider-
11 ation "the total number of troops and the places where
12 they are to be stationed, and so forth." We have taken
13 them into consideration -- together, they constitute
14 "the proposition as a whole."

15 Perhaps, after all, he had given us the answer:

16 "Q Now, in the proposal also there is again
17 no specific mention of the time of withdrawal of troops,
18 the number of troops to remain, and the other points
19 which were giving concern in the conversations, is there?
20

21 "A That is correct.

22 "Q But were these points explained in the
23 conversations by the two Japanese Ambassadors?

24 "A We had to read all their explanations in
25 the light of the instructions that was sent to
(288. T. 10927.)

Ambassador NOMURA.

1 "Q Well, then, there were explanations given?
2

3 "A Such explanations as were given are fully
4 there in the record. I don't recall exactly what was
5 said." 289

6 Not recall? If he listened, how could he ever
7 forget?

8 Small points perhaps they were, the questions
9 of the Tripartite Pact, the principle of economic non-
10 discrimination, the matter of withdrawal of troops from
11 China and Indo-China -- but they go to make up "the
12 proposition as a whole." Is it unreasonable to think
13 that America might have some little interest in this,
14 the first proposal made by a new Japanese Cabinet and
15 believed by it to represent substantial concession?
16 Here is precisely the situation contemplated by the
17 Foreign Minister when he asked assurance of the Premier
18 that "if the United States showed a receptive attitude"
19 toward the proposals newly made, he would give his
20 support to obtain still further reconsideration of the
21 concessions already made. 290
22 It might have been worth-
23 while, just asking the questions which would have showed
24 a receptive attitude. But they were not asked.

25 (289. T. 10920-21.

290. Testimony of TOGO, T. 35697.)

PROPOSAL "B"

1 58. That which is known as Proposal 'B' was
2 the alternative plan approved by the Liaison Conference
3 in Japan for use in the event that no favorable pros-
4 pect developed from the presentation of Proposal "A".
5 It was realized that the situation, which had been
6 deteriorating since the move into southern Indo-China,
7 had become so tense that it might be very difficult,
8 especially in a short time, to arrive at a definitive
9 settlement at a stroke of all outstanding issues. Pro-
10 posal "B" was therefore worked out as a modus vivendi,
11 to tide the situation over until a basis for final
12 settlement could be reached (certain particulars in
13 which Proposal "B" goes beyond a mere modus vivendi will
14 be adverted to later.)²⁹¹ After mid-November it
15 appeared that there was no favorable prospect from
16 Proposal "A", and Ambassador NOMURA accordingly was
17 instructed to present Proposal "B".
18

19 59. "...on November 20, the Japanese Amba-
20 sador and Mr. KURUSU presented to the Secretary of State
21 a proposal which, on its face, was extreme."²⁹² Per-
22 haps Mr. Ballantine has employed quite unintentionally
23 revealing language in thus undertaking to characterize
24 Proposal "B". One can visualize him, glancing at the
25

(291. Testimony of YAMAMOTO, T. 25948.

292. Testimony of Ballantine, T. 10811.)

document upon which hung the fate of nations, observing,

1 "Ah! This is extreme!"; discarding it. I hope to be
2 indulged in going behind the face, learning what this
3 document does contain, what it implies and what it might,
4 if not so cavalierly glanced at, have augured.

5 This is it:

6 "1. Both the Governments of Japan and the United
7 States undertake not to make any armed advancement into
8 any of the regions in the South-eastern Asia and the
9 Southern Pacific area excepting the part of French Indo-
10 China where the Japanese troops are stationed at present.

11 "2. The Japanese Government undertakes to with-
12 draw its troops now stationed in French Indo-China upon
13 either the restoration of peace between Japan and China
14 or the establishment of an equitable peace in the
15 Pacific area.

16 "In the meantime the Government of Japan
17 declares that it is prepared to remove its troops now
18 stationed in the Southern part of French Indo-China to
19 the northern part of the said territory upon the con-
20 clusion of the present arrangement which shall later be
21 embodied in the final agreement.

22 "3. The Government of Japan and the United
23 States shall co-operate with a view to securing the
24 acquisition of those goods and commodities which the two
25

countries need in Netherlands East Indies.

1 "4. The Governments of Japan and the United
2 States mutually undertake to restore their commercial re-
3 lations to those prevailing prior to the freezing of the
4 assets.

5 "The Government of the United States shall
6 supply Japan a required quantity of oil.

7 "5. The Government of the United States under-
8 takes to refrain from such measures and actions as will
9 be prejudicial to the endeavors for the restoration of
10 general peace between Japan and China." 293
11

12 The consequences of acceptance by the United
13 States of Proposal "B" are thus formidably catalogued by
14 Mr. Ballantine:

15 "(it) would have meant condonement by the
16 United States of Japan's past aggressions, assent by the
17 United States to unlimited courses of conquest by Japan
18 in the future, abandonment by the United States of its
19 whole past position in regard to the most essential
20 principles of its foreign policy in general, betrayal by
21 the United States of China, and acceptance by the United
22 States of a position as a silent partner aiding and
23 abetting Japan in her effort to create a Japanese
24 hegemony in and over the Western Pacific and Asia; it
25 (293. Ex. 1245-H, T. 10811.)

1 would have destroyed the chances of asserting and main-
2 taining American rights and interests in the Pacific;
3 and in its final analysis would have meant a most serious
4 threat to American national security." 294

5 These are horrendous consequences indeed; but
6 where is the demonstration that they follow from the
7 antecedent? We are given here only the witness's opinion
8 for it -- not explanation, not proof nor demonstration.
9 Perhaps that is not quite fair to him; he does add one
10 more point, with explanation of his conclusion:

11 "Their conditional offer to withdraw troops from
12 southern Indo-China to Northern Indo-China was meaning-
13 less as they could have brought those troops back to
14 southern Indo-China within a day or two, and furthermore
15 they placed no limit on the number of troops they might
16 continue to send there." 295

17 The reason for one of Mr. Ballantine's con-
18 clusions having been vouchsafed, it may as well serve as
19 a starting point for analysis of the proposal. And
20 first, in regard to the "conditional offer." One is at
21 a loss to know to what these words can possibly refer;
22 this offer is, it is submitted, as completely and
23 effectually unconditional as language can be made to ex-
24 press an undertaking. Where is the condition? The
25

(294. Testimony of Ballantine, T. 10814.

295. Id., T. 10815.)

1 Japanese Government "declares that it is prepared" to
2 move troops "upon the conclusion of the present arrange-
3 ment." We are told who is to act, what is to be done,
4 when it is to be carried out. The only condition of
5 its becoming effective is that of acceptance, the pass-
6 of consideration, the giving of the quid pro quo. If
7 it is in that sense, that the effectiveness of every
8 offer is conditional upon its acceptance, that Mr.
9 Ballantine's language is to be taken, certainly this
10 offer is accurately described as "conditional"; other-
11 wise his language has no meaning and the conclusion no
12 validity. By this example we may test his other sweep-
13 ing conclusions. Or, so far as concerns the series of
14 them quoted above, we may ignore them except as study
15 of the proposal itself puts them to the test.

16 THE PRESIDENT: We will recess for fifteen
17 minutes.

18 (Whereupon, at 1045, a recess was
19 taken until 1100, after which the proceed-
20 ings were resumed as follows:)
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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: Major Blakeney.

4 MR. BLAKENEY: Page 151, Section 60.

5 Mr. Ballantine had, no doubt, his reasons for select-
6 ing the Indo-China clause of Proposal "B" for special
7 comment. Whatever they may have been, the fact is
8 suggestive. The critical state to which, by 20 Novem-
9 ber, relations between the countries had been brought
10 was the result largely, as has been mentioned,²⁹⁶
11 of the complications consequent upon the Japanese
12 advance into southern Indo-China. The offer of with-
13 drawal from that area suggests an attempt to turn
14 back the clock, to undo the damage done to Japanese-
15 American relations by that move. And that the inten-
16 tion in drawing Proposal "B" had been that precisely--
17 to restore conditions to what they had been before
18 that movement took place -- is shown by the evidence.
19 By that time there was such a tenseness in the atmos-
20 phere, the state of mind, not only of the officials
21 of the two countries but of their public as well,
22 was so filled with mutual suspicion, that it seemed
23 the only hope of saving the situation lay in trying
24 to restore confidence by going back to the status quo
25 296. Supra, Section 47.

ante and obliterating all that had happened meanwhile.

1 Thus, says Foreign Minister TOGO, "The intention of
2 Proposal "B" was, by restoring conditions to something
3 resembling normal -- to those prevailing before July --
4 to create a calm atmosphere and remove the imminent
5 threat of an outbreak of war.²⁹⁷
6

7 This purpose would, it appears, have been
8 reasonably fulfilled by the adoption of the proposal.
9 The menace felt, by the United States and the nations
10 for whom she acted in attempting to reach a settlement
11 with Japan, of the Japanese troops in southern Indo-
12 China would have been removed, and with the giving
13 by Japan of that evidence of good faith the air should
14 have been cleared. Mr. Ballantine, however, says
15 that it would not have been; the troops withdrawn, he
16 points out, could have been returned to the South on
17 short notice. This suggests two considerations.
18 Firstly, that so could Japanese troops, before July,
19 before ever the movement into the South took place,
20 have been brought there on a moment's notice. No
21 assurance against such an act existed in July which
22 did not exist in November; to the extent that America
23 had not felt a Japanese menace before entry of the
24 troops in July, she might reasonably not feel it after
25
297. Tr. 35698.

1 their withdrawal in November. They could indeed be
2 returned there, but just as they could in July have
3 been dispatched there. Secondly, Mr. Ballantine's
4 argument amounts, of course, to saying that the
5 United States had no confidence that any agreement
6 reached with Japan would be carried out, which is the
7 same explanation that we have heard him giving earlier
8 for its lack of interest in Proposal "A."²⁹⁸ Now, to
9 decline negotiations because one has no confidence
10 that any agreement reached will be carried out is one
11 thing, and comprehensible. But to talk of carrying
12 on negotiations, while entertaining such a feeling
13 of suspicion, is surely to suggest only "keeping up
14 the appearance of continuing negotiating," as
15 Mr. Ballantine himself puts it.²⁹⁹ Whether the
16 American suspicion was justified is beside the point--
17 that is the larger question to which this entire argu-
18 ment is devoted -- but if as a result of it America
19 approached the negotiations with Japan with the
20 conviction that Japan's commitments were worthless,
21 there could be not only no chance of agreement but no
22 purpose in agreeing. On that assumption, agreement
23 for immediate withdrawal of troops from all Indo-China
24

25 298. Supra, Section 41.

299. Tr. 10824.

1 would have been of no avail. Agreement to disregard
2 the obligations of the Tripartite Pact would have been
3 valueless; an undertaking to withdraw all troops from
4 China in two years would have been worthless; commit-
5 ment to observance of the principle of nondiscrimina-
6 tion in commercial relations, in any form, would have
7 been meaningless. If that was the position of the
8 Department of State, that any offer made by Japan was
9 meaningless because an agreement founded on it might
10 not be carried out, we can spare ourselves the trouble
11 of devoting study to this small segment of history,
12 but must pass it by, saying that in the Japanese-
13 American negotiations of 1941 America deceived Japan
14 with trickery. This I do not care to say; and there-
15 fore proceed with the attempt to see what analysis
16 of Proposal "B" will teach.

17 61. Proposal "B" was primarily -- on its
18 face and by intention -- a suggestion for a modus
19 vivendi, a temporary adjustment, a plan for "first
20 relaxing the strained relations' between Japan and the
21 United States, especially in the Southwestern Pacific,
22 thereby contributing to the restoration of amicable
23 feelings between the two nations, and in promoting
24 the negotiations thereafter" (as Ambassador NOMURA
25

explained to Secretary Hull³⁰⁰). Possibly a modus vivendi could in some circumstances properly be described as "extreme," as this one appeared to Mr. Hull. (Parenthetically, the prosecution allege that Ambassador NOMURA also so regarded it,³⁰¹ an assertion without warrant or foundation in the evidence or in fact.) But it must require more than the bare assertion, in no matter how strong language it be couched, to bring conviction that this one could have entailed the consequences which Mr. Ballantine without doubt or qualification assigns it as its role. A modus vivendi does not and is not intended to last forever -- the connotations of the Latin phrase by 43,663 which we name it tell us that -- though such provisions as are agreed concurrently with it will. If this modus vivendi is put into effect, it is to make time for further negotiations toward settlement of the still unsolved problems -- the Tripartite Pact, the China Affair, economic matters, the Indo-China question itself. What then? Negotiations are resumed; they will succeed, or not, or either party may discontinue them, but in any of those events the modus vivendi is at an end. How has America thereby committed any act of the effect which Mr. Ballantine describes as entailed the consequences which Mr. Ballantine without doubt or qualification assigns it as its role. A

300. Ex. 2941, Tr. 26031.
 301. Summation, Section G-124 (Tr. 39666).
 The statement by one-time Secretary of State Byrnes

modus vivendi does not and is not intended to last forever -- the connotations of the Latin phrase by 43,663

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23 that Proposal "B" was "extreme" (Exhibit 1,233,Tr.10,630)
24 is of course the ran'est hearsay, Mr. Byrnes having had
25 no connection whatever with the State Department prior to
1945, and having been a Justice of the Supreme Court in
1941.

1 sharing in the loot? Where is the threat to her own
2 security, when she can at will take what measures,
3 including war, she pleases? In this case, by the
4 way (this is the point in which Proposal "B" goes
5 beyond a simple modus vivendi), negotiations would
6 have been resumed with a considerable part of the
7 American position already conceded by Japan, if we
8 have been correct in our analysis of the negotiations
9 culminating in Proposal "A" on the Tripartite Pact
10 and economic activities; for Japan was prepared to
11 carry over into an agreement based on Proposal "B"
12 her commitments on these points offered in Proposal
13 "A". 302

14 62. Was Proposal "B", then, fairly calcu-
15 lated to restore something approaching the status quo
16 ante the move into southern Indo-China? Certainly,
17 insofar as Indo-China itself, the main point, is
18 concerned, it did that -- and more -- no troops in
19 the southern part, those in the northern to be with-
20 drawn "upon either the restoration of peace between
21 Japan and China or the establishment of an equitable
22 peace in the Pacific area." This latter clause having
23 appeared in no Japanese proposal prior to 28 August,
24 302. Ex. 779, p. 7;
25 Testimony of YAMAMOTO (Tr. 25948).

1 the position regarding withdrawal from northern Indo-
2 China is much improved over that of July. But
3 "restoring the status quo ante" means, fundamentally,
4 restoration of confidence; and herein, it is submitted,
5 is the real significance of Proposal "B." Considering
6 Japanese-American relations of 1941 in their entire
7 aspect, it had been the Indo-China move of July by
8 which relations had changed from bad to tense. That
9 action had convinced the United States and her
10 associates that Japan was bent on following the course
11 of aggression, and would not be dissuaded, that her
12 protestations of peaceful intent were those of in-
13 sincerity; the sequel to that action, the American,
14 British and Dutch rupture of economic relations with
15 Japan, was regarded by Japan as economic relations
16 with Japan, was regarded by Japan as economic warfare
17 upon her, threatening her very existence. The United
18 States, of course, did not know by what process of
19 compromise, of resolution of conflicting views of
20 policy, the Liaison Conference in Tokyo had come to
21 the willingness to enter into a modus vivendi including
22 immediate and unconditional withdrawal of troops from
23 southern Indo-China. But America had, I say, regarded
24 the move into that area as all-but-conclusive proof
25 of Japan's settled policy of aggression; how could

1 she mistake the tremendous psychological significance
2 of this retreat? No matter if the troops could be
3 returned to southern Indo-China in a few days; the
4 evidence of this proposal reversing pro tanto that
5 policy was that it was being abandoned, for an aggressor
6 does not voluntarily abandon his conquests while
7 retaining his aggressive intent. The very fact that
8 such a proposal could be made was indicative (and,
9 as the Tribunal knows from the testimony of many
10 witnesses to the violent disputes occasioned by it in the
11 Japanese Liaison Conference, was in truth the proof)
12 that the policy of use of force was losing its vigor.
13 Ballo tine said that it was still possible, even
14 then, for Japan to give evidence of good faith "by
15 withdrawing troops or any other practical evidence
16 of an intention to follow peaceful courses"; ³⁰³ what
17 more practical evidence than this agreement for
18 immediate withdrawal of the very troops the dispatch
19 of which had brought the conviction of Japan's unpeace-
20 ful course? This change of front by Japan, it is sub-
21 mitted, can in respect of this question be regarded
22 only as a restoration and more of the status quo ante
23 the move into the south.

63. What of the other questions involved in Proposal "B"; have the Japanese proposals as to them the effect of restoration of the status quo ante? The prosecution, claiming thereby to have demonstrated the "narrowing" process which they contend characterized the Japanese attitude toward the Japanese-American negotiations, have adopted the method of comparison of successive Japanese proposals (comparison "as a whole," of course, never of "small details"). Let us apply that process--but attending to the parts of the whole--to the position as it stood with the presentation of Proposal "B." Taking the proposal by items, it is instructive to place beside it the corresponding provisions of the proposal of 6 August,³⁰⁴ the first which undertook solution of the Indo-China question, and the intervening one of 25 September,³⁰⁵ to find how the Japanese position had changed.

Withdrawal of forces from French Indo-China was proposed, in August, upon settlement of the China Affair; in September upon establishment of an equitable peace in the Pacific area. By Proposal "B" in November, both alternatives were offered; with the new agreement to withdraw from Southern Indo-China immediately.

304. Ex. 2805, Tr. 25760.

305. Ex. 1245-E, Tr. 10782.

Clearly no narrowing there; far broader.

1 In August, a special status of Japan in
2 Indo-China was to be recognized even after withdrawal
3 of troops; in September, the principle of commercial
4 nondiscrimination was recognized to be applied to the
5 Southwestern Pacific area. In November, application
6 to the entire world of the principle of nondiscrimina-
7 tion was agreed (brought over from Proposal "A"). No
8 narrowing there, but the ultimate in broadening.
9

10 In August, the United States was to tender
11 good offices for peace negotiations between Japan
12 and China; in September, to refrain from measures
13 which would hamper efforts for settlement of the
14 China Affair; in November, to refrain from measures
15 prejudicial to the endeavor for restoration of peace.
16 Though differently phrased, the three mean the same
17 thing, the first having always been explained as re-
18 quiring cessation of aid to Chiang Kai-shek. No
19 broadening, but no narrowing.
20

21 In August, there was to be American coopera-
22 tion to secure for Japan resources needed from the
23 Netherlands East Indies, Japanese cooperation to
24 secure for America such resources needed from East
25 Asia; in September, cooperation to secure commodities
from the Powers concerned. In November, cooperation

1 to secure commodities required by the two countries
2 in the Netherlands Indies. Possibly somewhat narrowed--
3 but to be considered in the light of the fact that in
4 November Japan no longer demanded recognition of any
5 special position of hers in French Indo-China and the
6 Netherlands Indies.

7 In August (and in September, substantially)
8 Japanese guarantee of the neutralization of the
9 Philippines is to be given on condition of nondiscrim-
10 inatory treatment of Japanese nationals and interests
11 there. In November there is no mention of this
12 matter. Probably a broadening.

13 Finally, though it is not expressed in the
14 proposal, it appears that the November offer contem-
15 plated that Proposal "A's" 25-year goal for with-
16 drawal of troops from China would stand -- unless,
17 indeed, in accordance with the general tone of
18 Proposal "B" as exemplified by the immediate retreat
19 from southern Indo-China, this term too was to be
20 relaxed still more. This, of course, a tremendous
21 broadening.
22

23 64. The only intimation given us by the
24 evidence of that in Proposal "B" which constrained
25 Mr. Hull to regard it as "extreme" was his response
to the clause providing for American abstention from

1 measures "prejudicial to the endeavors for the
2 restoration of general peace between Japan and
3 China." Ambassador NOMURA reported after the inter-
4 view at which he presented Proposal "B" that "Hull
5 showed complete disapproval of the item,"³⁰⁶ and
6 that point alone appears, from the evidence, to have
7 occasioned any discussion. For understanding of
8 those discussions, it is necessary to go back a
9 moment.

On 7 November, when Proposal A was presented to Secretary Hull, he had inquired of Ambassador NOMURA as his own personal idea how Japan would receive a pledge from China's highest authority to the government and people of Japan of China's sincere friendship and desire for restoration of friendly relations.³⁰⁷ This suggestion being transmitted to Tokyo, it was readily accepted, on the understanding (which was never denied) that it implied the proposing by Chiang Kai-shek of peace negotiations, to promote the establishment of peace between the two nations.³⁰⁸ It was concurrently pointed out to Ambassador NOMURA that it would still "meet the original desire of the Japanese Government ... if the United States intends at this juncture to proffer its good offices between Japan and China in accordance with the line suggested by Secretary Hull ..."³⁰⁹ (It had been assumed by every proposal and counter-proposal and in all conversations since May that as part of any settlement the United States would tender such good offices, or "suggest" to China the commencement of negotiation, or some equivalent, and that peace negotiations would start simultaneously with the Japanese-American settlement.)

307. Ex. 2928 (tr. at 25,989).
308. Ex. 2930 (tr. 25,998).
309. Ex. 2932 (tr. 26,000)

This was on 10 November.

1 After the presentation of Proposal B it was
2 still the Japanese position that realization of Presi-
3 dent Roosevelt's offer to act as "introducer" to bring
4 Japan and China together for peace talks was desired --
5 abandoning the long-standing policy of refusal to treat
6 with Chiang Kai-shek -- and that it was hoped that China
7 would pledge friendship and that peace talks would
8 begin in accordance with Secretary Hull's suggestion. 310

9 This, as Foreign Minister TOGO pointed out, implied
10 the expectation that "an agreement for a truce will
11 be concluded between Japan and China at the opening
12 of such negotiations," concurrently with the closure
13 of an agreement under Proposal B; 311 there seems there-
14 fore to be much logic in his position that as a matter
15 of course American aid to China would from the conclu-
16 sion of the agreement be neither necessary to China, with
17 hostilities suspended, nor consistent with the American
18 role of supporter of efforts for peace. Although
19 Secretary Hull had taken exception to the clause of
20 Proposal B relating to the stoppage of this aid, he
21 could scarcely have taken exception to it on any ground
22 of newness, it having been a familiar item of proposals
23
24

25 310. Ex. 2947 (tr. at 26,052).

311. Ibid.

1 from months before. He had in fact said only that it
2 was difficult to change the poli aid to China
3 "so long as it remains unclear whether Japan's atti-
4 tude toward peace is unwavering." 312. It is sub-
5 mitted that, at least until such time as she received
6 some sign of sympathetic reception, Japan had at the
7 time of Proposal B by her willingness to abandon
8 southern Indo-China and the eagerness revealed to make
9 a peace with the China of Generalissimo Chiang made
10 as clear as could be expected a desire to adopt an
11 attitude of peace.

12 65. The prosecution give evidence of having
13 some difficulty -- of which the State Department showed
14 no trace -- over the oil question in Proposal B. This
15 was a part of the implementation of the clause for res-
16 toration of commercial relations to those prevailing
17 prior to the freezing of assets in July, and as such
18 would merely have put matters in the posture they had
19 at that time. It was provided that "The Government of
20 the United States shall supply Japan a required quanti-
21 ty of oil." Oil was being supplied, subject to numer-
22 ous restrictions, prior to the economic rupture. When
23 for a time there appeared a prospect of agreement on
24
25 312. Ex. 2941 (tr. 26,030).

the basis of Proposal B, instructions were sent to
 1 Ambassador NOMURA of the quantity of oil which would
 2 be expected in accordance with this provision.³¹³ This
 3 was a natural move, with no sinister implications; the
 4 Japanese Government had instructed the Embassy when
 5 Proposal B was being presented that "the required
 6 quantity be decided upon by agreement of both govern-
 7 ments before the signatures are affixed to this present
 8 agreement,"³¹⁴ and again in the telegram instructing
 9 the quantity required it was pointed out that "as nego-
 10 tiations develop but prior to the signing of the agree-
 11 ment" there should be discussion of the amount to be
 12 supplied.³¹⁵ The prosecution, however, point out that
 13 a proposal that a much larger quantity be stipulated
 14 for was originally submitted by the Army General Staff --
 15 which is true but, so far as concerns the United States,
 16 irrelevant in any event, because that proposal was
 17 never submitted to her. Instead, at the insistence
 18 of the Foreign Ministry the amount to be stipulated
 19 was much reduced -- to a figure roughly equivalent to
 20 the average of imports over some few years preceding.³¹⁶
 21 It is said by the prosecution that "YAMAMOTO tried to
 22 leave the impression that the plan was not considered
 23
 24

25 313. Ex. 2944 (tr. 26,041)

314. Ex. 1180 (tr. 26 10,388).

315. Ex. 2944 (tr. 26,041)

316. Testimony of TOGO (tr. 35,703)

1 by the Liaison Conference," but that "the accused
 2 TOGO made it clear in his affidavit that such a proposal
 3 was submitted but that the requirements were reduced
 4 substantially at his insistence."³¹⁷ The statement
 5 is correct except in its inference that Mr. TOGO testi-
 6 fied that the original plan was submitted to the Liai-
 7 son Conference; while it would be immaterial if true,
 8 it is not true and there is no evidence supporting the
 9 inference.

10 While the prosecution, by the way, appear
 11 critical of the amount of oil thus stipulated, the
 12 United States seems to have evinced no concern over
 13 that point. Secretary Hull did call attention of
 14 Ambassador NOMURA to the fact that Japanese oil imports
 15 had taken a sharp rise just before the freezing went
 16 into effect, which suggested to him stock-piling for
 17 military use;³¹⁸ but the request which went to Ambassador
 18 NOMURA for submission to the United States was upon an
 19 entirely different basis from the imports of that period
 20 of time which was worrying Mr. Hull. The quantity
 21 desired from the United States was approximately the
 22 average of imports for the years 1938-40, when normal
 23 commercial relations were subsisting;³¹⁹ from the

25 317. Summation, SG-125 (tr. 39,669).

318. Memorandum, Ex. 1184 (tr. at 10,402).

319. Ex. 2944 (tr. 26,041).

1 Netherlands Indies, substantially that which had been
2 agreed between Japan and the Netherlands authorities
3 in mid-1940.³²⁰

4 66. Proposal B, then, upon dissection seems
5 to have inherent in it none of those tendencies which
6 Mr. Ballantine felt impelled to catalog so horrendous-
7 ly. At any rate, if the State Department was perturbed
8 over one aspect of it or another -- over the cessation
9 of aid to Chiang Kai-shek, or the petroleum requirement,
10 which it knew from intercepts, or something else --
11 those things might have been the subject of negotiation.
12 Again, as in case of Proposal A, it did not put the
13 questions, whether relaxation was not possible, did
14 not make the counter-proposals which could have led to
15 negotiation on such points. It appears that again,
16 possibly because of lingering distrust, the United
17 States took little account of the words of the propo-
18 sals or the explanations of the Japanese Ambassadors,
19 but relied rather on what it thought was contained in
20 the Ambassadors' instructions.

21 Secretary Hull told Ambassadors NOMURA and
22 KURUSU that not only he, but the representatives of
23 Britain, Australia and the Netherlands, would be glad
24 320. Testimony of ISHIZAWA (tr. 25,273, as corrected)
25

1 to go some way to meet Japan "if Japan has (a) firm
2 intention for carrying out a peaceful policy." 321

3 Proposal B, coming after Proposal A, appears at this
4 distance to have been an altogether extraordinary mani-
5 festation of such an intention. It is submitted that
6 it may well be regarded as a most reasonable effort to
7 arrive at a modus vivendi, and even concurrently to
8 concede several of the substantive points to the United
9 States. The first retreat -- physically, of soldiers,
10 forthwith -- the first immediate abandonment of what the
11 Western Powers regarded as Japan's ill-got gains; the
12 clearest indication that there yet lived unsuppressed
13 a moderate spirit in Japan; these are the significant
14 aspects of Proposal B.

15 THE "HULL NOTE"

16
17 67. The note which Secretary Hull handed
18 to Ambassador NOMURA on 26 November (frequently refer-
19 red to as the "Hull Note") was such as might, in view
20 of the history of the negotiations, have been expected.
21 Secretary Hull, in his oral statement accompanying the
22 document, referred to it as "an effort to bridge the
23 gap between our draft of June 21, 1941, and the Japanese
24
25 321. Ex. 1184 (tr. 10,402).

1 draft of September 25 by making a new approach to the
2 essential problems underlying a comprehensive Pacific
3 settlement."³²² The recipients of the note, on the
4 other hand, regarded it as being wholly a new depart-
5 ure, as an "ultimatum" or "challenge," and as closing
6 the gates on efforts to settle the problems between
7 the nations by further negotiation on the line which
8 had been followed in the past.³²³ It is submitted that
9 the prosecution's repeated stigmatization as "insolent"
10 of the defendants' statements of their views to this
11 effect does not assist in determination of the case;
12 it cannot be "insolent" for a defendant to criticize
13 the policy of the United States and defend his own,
14 for which he is on trial; he has the right to make his
15 defense, affirmative as well as negative, and to show
16 if he can that good faith or probable cause which, if
17 established, will prove him not to have acted criminally
18 and to be entitled to acquittal.

19 It is proposed therefore to subject the United
20 States note of 26 November to analysis to determine
21 whether its effect is that which Mr. Hull believed or
22 that mentioned by the defendants. The document is too
23 long to set out in full here. It commences with a
24

25 322. Ex. 1245-I (tr. 10,815, at 10,819).

323. Testimony of TOGO (35,706, 36,093, 36,108).

1 statement, different in language but not in essence
2 from what had been included in the earlier drafts, of
3 general principles, but including Mr. Hull's "Four
4 Principles." The operative provisions are found in a
5 second part, entitled "Steps to be taken by the Govern- 324
6 ment of the United States and the Government of Japan."
7 These may be summarized in this way:

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24 324. Ex. 1245-I (tr. at 10,821 et seq.)
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1 1) The two governments to endeavor to
2 conclude a multilateral nonaggression pact among
3 themselves and the British Empire; China, the Nether-
4 lands, the Soviet Union and Thailand.

5 2) The two governments to endeavor to con-
6 clude among themselves and the British, Chinese,
7 Dutch and Thai Governments an agreement for respect-
8 ing the territorial integrity of French Indo-China,
9 for joint consultation over necessary measures to
10 meet any threat to it which might develop, and for
11 maintenance of equality of commercial opportunity in
12 Indo-China.

13 3) Japan to withdraw all military, naval,
14 air and police forces from China and Indo-China.

15 4) The two governments to support no govern-
16 ment or regime in China other than the Chungking
17 Government.
18

19 5) Both governments to give up all extra-
20 territorial rights in China, including rights under
21 the Boxer Protocol and concessions, and to endeavor
22 to obtain the agreement of other governments to do
23 likewise.

24 6) The two governments to enter into nego-
25 tiations for conclusion of a trade agreement based on
most-favored-nation treatment and reduction of trade

barriers.

1 7) The freezing of assets to be rescinded
2 by both governments.

3 8) A plan to be agreed upon and a fund
4 established for stabilization of the dollar-yen rate.

5 9) Both governments to agree that no agree-
6 ment which either had concluded with any third Power
7 should be interpreted in such a way as to conflict
8 with the fundamental purpose of this agreement, the
9 establishment and preservation of peace throughout
10 the Pacific area.
11

12 10) Both governments to use their influence
13 to induce other nations to adhere and give practical
14 application to the basic political and economic
15 principles of this agreement.

16 This was the proposal which the Japanese
17 Government felt to have ignored the progress toward
18 understanding of eight months of negotiation, and
19 to have been the challenge to surrender or war in
20 that the United States knew that it could but be un-
21 acceptable to Japan. Of it the prosecution say that
22 "it contained not a single proposal, except for the
23 multilateral treaties, which had not been repeatedly
24 made before. It did not ask Japan to do anything
25

which she was not already committed to do." 325. A

1 brief discussion may be of service in finding the
2 truth between these widely-separated views.

3 68. The multilateral nonaggression pact
4 had never before been mentioned, so far as the
5 evidence discloses, in the negotiations. This pro-
6 posal thus not only implied importing into the dis-
7 cussion two additional nations -- the USSR and Thai-
8 land -- but by suggesting action which would inevi-
9 tably be time-consuming and productive of delay
10 pointed to indefinite protraction of the attempts to
11 reach a settlement despite the critically tense
12 situation then prevailing. In Japan, as the Tribunal
13 knows from the evidence, the government was under
14 strong pressure of the armed forces -- which felt
15 that they would be incapable of carrying out their
16 duty of defense of the nation if any further delay
17 occurred -- to conclude an agreement or at the least
18 show some signs of progress toward one without
19 further loss of time. 326. Such a provision as this

20 325. Summation, G-128-A (T. 39674).

21 326. KONOYE Memoirs, exhibits 2913 (T. 25860) and
22 2914 (T. 25868); testimony of YAMAMOTO (T.
23 25922-24), TOGO (T. 35690-97), and TOJO
24 (T. 36292, et seq.).

25

1 one was perfectly calculated to cut the ground from
2 under the government's feet in its effort to secure
3 general consent to continuance of negotiations.

4 The same remarks are pertinent to the second
5 clause, that for a multilateral agreement over the
6 status of French Indo-China. Japan had already, by
7 Proposal "B," abandoned any claim on her part to
8 special rights there; putting the matter in form of
9 a multilateral agreement would but complicate the
10 solution of the Indo-China problem and postpone its
11 eventual settlement.

12 These two points were wholly new with the
13 26 November plan; those which follow deal, for the
14 most part, with those things which had been the
15 subject matter of the negotiations. Clause three
16 may be considered, in view of the dominant importance
17 throughout the negotiations from beginning to end of
18 the question of a Sino-Japanese settlement and the
19 stationing of Japanese troops thereafter in China,
20 as the crux of the Hull note. The clause provides
21 for the withdrawal of Japanese forces -- military,
22 naval, air and police -- forthwith and unconditionally
23 from China and Indo-China. The negotiations from
24 May to November having been centered largely around
25 the questions of the time for and the terms of Japanese

1 withdrawal of these forces, it is self-evident that
2 this clause is a great departure from what had formerly
3 been the American position. As we have already seen,
4 the State Department's interest had been to secure
5 definition of the time for which Japanese troops would
6 be left in China for the purposes contended by Japan
7 to be reasonable and necessary, to mark out precisely
8 the areas in which those troops would be stationed, to
9 know what their numbers would be. Such questions had,
10 ever since the first American counter-proposal of
11 31 May, been "subject to further discussion" (and had
12 remained so in the last American draft, that of 21
13 June). The United States representatives had repeatedly
14 said that they had no thought of demanding immediate,
15 total, unconditional withdrawal from China, but were
16 prepared to discuss -- as in fact they did exhaustively
17 discuss -- the details of the withdrawal.^{327.} Where
18 in long months of negotiation their chief concern
19 had been to have a clear manifestation only that the
20 stationing of troops would be limited in time (and
21 to proper areas), where but ten days earlier they had
22 offered no objection to Japan's leaving stationed in
23 China ten per cent of her troops then there,^{328.} now
24
25

327. Testimony of Ballantine (T. 10913); Memorandum,
exhibit 2911 (T. 25856).

328. Exhibit 2940 (T. 26027).

1 complete abandonment of any effort at further dis-
2 cussion demanded Japan's immediate and unconditional
3 submission to a far harsher demand than had ever be-
4 fore been suggested. This clause, it cannot be doubted,
5 may be correctly described as "ignoring all past
6 progress in the negotiations."

7 So of the proposed mutual undertaking to
8 support no government or regime in China other than
9 that of Chungking; this is in two ways a radical new
10 departure. On the one hand, the question of Manchukuo
11 had likewise always been "subject to further discussion";
12 Japan had included "recognition of Manchukuo" as a term
13 in its proposals, the United States had countered with
14 "amicable negotiations in regard to Manchoukuo" and
15 had left the matter "subject to further discussion."
16 By this proposal discussion is cut off, Manchoukuo is
17 to be abandoned. Additionally, the Hull note requires
18 the repudiation of the Wang Ching-wei regime of Nanking,
19 which the discussions had contemplated would, rather
20 than being destroyed, merge and fuse with that of
21 Chiang Kai-shek,³²⁹ and in this respect likewise is
22 a new departure.
23

24 The fifth clause, proposing abandonment by
25 the parties of all extraterritorial rights in China,
329. Memorandum, exhibit 1083 (T. 9964).

1 was certainly not the request that Japan do something
2 that "she was already committed to do," as the
3 prosecution think. An extraterritorial right is a
4 right, which is to say by definition something which
5 the possessor is not under obligation to give up;
6 indeed, such a claim was never made in the negotia-
7 tions, though Secretary Hull did suggest the desira-
8 bility of such rights' being surrendered by all
9 countries having them. In fact, the Tribunal can
10 take judicial notice that, though the United States
11 has by treaty made during war time surrendered her
12 extraterritorial rights in China, other nations
13 retain them today, nor is it clear that they are
14 "committed" to giving them up until they commit them-
15 selves to doing so. At all events, the proposal that
16 the United States and Japan alone abandon such rights
17 as of November 1941 would have meant, not the promo-
18 tion of equal opportunity and the Open Door in China,
19 but the putting of these two countries at a disadvan-
20 tage as regards other powers which might not yield
21 to their persuasions to follow suit. Japan had for
22 half a century maintained its claim (recognized by
23 the United States, for example, in the 1917 Lansing-
24 ISHII Agreement³³⁰) that geographical propinquity
25 330. Exhibit 2317 (T. 17389).

to China endowed it with special interests there, which should be internationally recognized; now, it was demanded that she not only abandon that claim (which had been done, so far as commerce is concerned, by Proposal "A"), but recognize the possession of such positions, superior to hers, of all other countries except the United States.

Clauses six, seven and eight, providing for mutual rescission of the freezing of assets, most-favored-nation trade relations and exchange stabilization, were substantially in accord with the trend of the preceding negotiations.

The clause aimed at the Tripartite Pact goes considerably beyond America's insistence theretofore, amounting in effect to the requirement that the pact be repudiated. While certainly the wording of the clause is not offensive -- that no agreement which either party had concluded should be "interpreted in such a way as to conflict with . . . the establishment and preservation of peace throughout the Pacific area" -- in the context of the conditions when it was delivered this clause, going much beyond the previous American demands for a Japanese declaration that the purpose of the pact was defensive and that it would not be called into operation by American action in

1 self-defense, amounted to a requirement that the
2 Pact be publicly abrogated. The interpretation de-
3 manded by this 26 November note is not only a rever-
4 sion to the American contention that that is properly
5 denominated self-defense which it chooses to denomi-
6 ate so, but is a more embracing requirement of
7 interpretation tantamount to a demand for repudiation.
8 In the past, America had required an interpretation
9 which would prevent war with Japan if the United
10 States, acting in what she conceived to be self-
11 defense, became involved in war with Japan's ally,
12 Germany. The interpretation now proposed requires
13 that action which would disturb the peace of the
14 Pacific shall in no circumstances be taken in obedi-
15 ence to that Pact -- whether America move in self-
16 defense or conduct war of unblushing aggression,
17 still the Pact shall not be interpreted "in such a
18 way as to conflict with the fundamental purpose of
19 this agreement, the establishment and preservation
20 of peace throughout the Pacific area."
21

22 The last clause, providing for the attempt
23 to induce other nations to follow the courses agreed
24 by these two, is of course unobjectionable, and em-
25 bodies an idea which had been implicit throughout the
negotiations.

69. Reverting, now to Secretary Hull's suggestion that this document was founded upon the last preceding American proposal, that of 21 June, let us put side by side the chief controversial provisions of each, stating them not in ipsissimis verbis but in terms of their effects in the light of the conversations:

331 21 June	332 26 November
(No equivalent provision)	Multilateral non-aggression pact.
(No equivalent provision)	Multilateral convention concerning French Indo-China.
Questions of the time and terms for withdrawal of Japanese troops from China subject to further discussion (no equivalent provision as to Indo-China)	Immediate and unconditional withdrawal of all Japanese military, naval, air and police forces from China and Indo-China.
Amicable negotiations in regard to manchukuo.	Non-recognition of any regime or government in China other than the Chungking Government.

331. Exhibit 1092 (Tr. 10,005)

332. Exhibit 1245-I (Tr. 10,815)

21 June

26 November

1 Japan to give an interpre-
 2 tation of the Tripartite
 3 Pact satisfactory to Amer-
 4 ica that American actions
 5 in self-defense would not
 6 call it into operation
 7 against her.
 8

9 (No equivalent provision)

Abrogation of the Tripar-
 tite Pact.

Renunciation of extra-ter-
 ritorial rights, conces-
 sions and Boxer Protocol
 rights in China.

13 It is submitted that on the face of this
 14 juxtaposition, not only had the various provisions
 15 of the Hull note not been "repeatedly made before,"
 16 but the most of them are completely new, the remainder
 17 go much further than any United States position there-
 18 tofore taken. Of the ten points which compose it
 19 numbers 6, 7, 8 and 10 may be conceded to be neither
 20 new nor objectionable. Of the remaining six points as
 21 we have grouped them above, only one can be in any way
 22 considered to represent demands made before. The
 23 multilateral non-aggression pact and convention con-
 24 cerning Indo-China are, as the prosecution concede,
 25 wholly new. The suggestion that the United States

1 required the immediate and total withdrawal of
2 Japanese troops from China, so far from having been
3 repeatedly made before, had been repeatedly denied by
4 the Secretary of State and his assistants in the
5 negotiations, and was specifically denied by one 333
6 of them from the witness box here, in this Tribunal;
7 a provision for complete withdrawal of troops is
8 certainly new in the sense that it is not an aspect
9 of the question of how many troops shall remain in
10 what areas for how long. There is no evidence of
11 any prior American insistence upon immediate with-
12 drawal of troops from Indo-China; though of course
13 Japan had offered it, so far as concerns the southern
14 part, by Proposal "B." Non-recognition of any regime
15 or government in China other than that of Chungking
16 implied withdrawal of recognition from Manchukuo,
17 never before demanded but always treated as a matter
18 for settlement between China and Japan, and from the
19 Wang Ching-wei regime, which (while she had never
20 approved of it) America had seemingly been content,
21 in the past, to see fused with the Chungking Govern-
22 ment. The surrender by Japan and the United States
23 of their extraterritorial rights in China had never
24 before been proposed more concretely than as part of
25 333. Testimony of Ballantine (Tr. 10,913):

1 a dream of Mr. Hull's for general realization. In
 2 the proposal relative to the Tripartite Pact alone
 3 can we find something recognizably like positions
 4 which had preceded; true, an "interpretation" is
 5 still demanded, as always, but it is now one so
 6 vague and general as to amount to that repudiation
 7 of the Pact which the United States had always main-
 8 tained that it did not ask.

9 70. The prosecution will have it that "it
 10 is impossible to ascertain in what respect (the Hull
 11 Note) is an ultimatum. The accused themselves and
 12 their witnesses, when asked to point out what in the
 13 document partook of the nature of an ultimatum, were
 14 either unable to do so or else went off into the rare-
 15 fied realm of Japanese metaphysics."³³⁴ Counsel has
 16 not read the record. Defendants gave their reasons
 17 for considering the Hull Note to be an "ultimatum,"
 18 or did so to the extent that they were permitted to
 19 do so by cross-examining counsel; in the few instances
 20 when the prosecution ventured to cross-examine on the
 21 matter, the explanations were cut off by change of
 22 subject or by the cross-examiner's wandering off
 23 into argumentative questions on matters of opinion.³³⁵

25 334. Summation, SG-128-A (Tr. 39,673)

335. Testimony of defendants SHIMADA (Tr. 34,763), TOGO
 (question by Tribunal, Tr. 36,127-8, 36,135-8) and TOJO
 (Tr. 36,082-92). Defendants KAYA, KIDO and SUZUKI, who
 testified in chief re this, not cross-examined as to it.

1 The prosecution made a valiant effort to confine dis-
2 cussion of the Hull Note to the mere words on the
3 paper, to abstractions or metaphysics, to exclude any
4 effort to interpret it as a fact in relation to its
5 context of circumstance. It is, of course, the prac-
6 tical application to international affairs of the
7 general principles which -- just as it has furnished
8 the subject of negotiations -- was so treated in the
9 Hull Note as to lead the defendants to the belief
10 which they entertained. Let us inquire what those
11 practical applications as framed in Mr. Hull's pro-
12 posal would have amounted to.

13 The greater number of the stipulations of
14 the American note centered about the China question.
15 Japan was to withdraw forthwith all troops from China,
16 including even the police who were there to enforce
17 order in concessions and Boxer Protocol areas; those
18 concessions and the rights granted under the Boxer
19 Protocol were to be surrendered, with all other
20 extraterritorial rights; the withdrawal and surrender
21 of rights was applicable equally to Manchukuo, from
22 which also Japanese recognition was to be withdrawn;
23 the Wang Ching-wei Government was to disappear. The
24 effect of this would have been complete and total
25 withdrawal from the Continent -- abandonment of

1 Japan's legitimate as well as illegitimate interests.

2 As one of the defendants pointed out, "such a politi-
3 cal condition or situation would of itself affect

4 even the area of Korea." That is to say, Japan would
5 be placed in a predicament wherein she must withdraw

6 also from Korea.³³⁶ Her Continental interests totally

7 abandoned, her prestige in Asia vanished, Japan truly,

8 "vis-a-vis international relations, would have been

9 placed in the same situation that she is in today.

10 To say that again in different words, this demand

11 was asking Japan to return to a situation and cir-

12 cumstances which were already much worse than the

13 situation which existed at the time of the Manchurian

14 Incident. Or, more than that, to return to the situa-

15 tion in which Japan was before the Russo-Japanese War.

16 In other words, this was asking for Japan's suicide

17 as a great Power in East Asia³³⁷ That such

18 was the effect of the Hull Note the defendants may

19 well have believed; and that Japan's "suicide as a

20 great Power" might result in her ceasing to be a Power

21 at all, or even an independent nation, is not incon-

22 ceivable. Japan could not become again the recluse

23 island empire that she had been before the day the West

24 336. Testimony of TOGO (Tr. 36,136)

25 337. Ibid.

forced her at cannon-mouth to emerge into the world; she was become too populous, she could not support her people; unless a Power, she was nothing, she was a beggar among nations. So felt all of them; "the general opinion was that acceptance of the conditions of this note would be tantamount to the defeat of Japan," says another of the defendants;

" . . . it seems clear that no nation willingly relegates itself to a secondary position as a world power if it can help it. . . . As a patriotic Japanese loving my country I was confronted with the question of whether or not Japan could bow to the American demands and yet preserve its standing in the world." ³³⁸

Terms proposed by the Hull Note for Japanese acceptance were those which would be imposed by victor upon vanquished, those equivalent to what China might have offered to Japan after defeating her, but cannot be comprehended coming from a neutral interested in rendering good offices by way of mediation rather than one undertaking full intervention in the conflict. Nor, it should be noted, was this the opinion of the defendants alone in Japan. There is no record of dissent by anyone conversant with the ³³⁸. Testimony of SHIMADA (Tr. 34,665-66)

1 circumstances who passed judgment on the Hull Note--
 2 Liaison Conference, Cabinet, Supreme War Council,
 3 Elder Statesmen, all agreed. The prosecution now
 4 attempt to minimize the concurrence of the Elder
 5 Statesmen; they are now the defendants' "fellow
 6 conspirators" (notwithstanding two of them were im-
 7 portant prosecution witnesses, one being given an
 8 extraordinary testimonial in open court by the chief
 9 prosecutor),³³⁹ and they could not exercise informed
 10 judgment because "all really vital material was with-
 11 held" from them.³⁴⁰ Unfortunately for this latter
 12 contention, the very "fellow conspirator" who testi-
 13 fied to material's having been withheld stated also
 14 that detailed explanation, to the satisfaction of all
 15 present, was made of the diplomatic questions;³⁴¹ and
 16 "withholding," if it occurred, was of military and
 17 production data, and so may have affected their judg-
 18 ment of Japan's prospects in a war, but not of her
 19 compulsion to undertake it.

21 Much breath has been expended in this court-
 22 room in discussion of the topic, "ultimatum." Whether
 23 the Hull Note be characterized as an "ultimatum" is
 24 utterly immaterial; it is its effect which concerns us.

25 339. Tr. 29,301

340. Summation, §G-132 (Tr. 39,680)

341. Testimony of Admiral OKADA, Keisuke (Tr. 29,314)

The Japanese thought that it forced war upon them.

Mr. Hull thought the same. With the handing of his note to the Japanese Ambassadors on 26 November, he placed the matter "in the hands of the Army and Navy"³⁴²

-- the words are his own -- announcing on the 27th that "the conversations had been terminated with the barest possibility of resumption."³⁴³

The free press of America formed the same opinion of the Hull Note; the Secretary held special press conferences on the 26th and 27th, when, abandoning the policy of both governments since the beginning of the negotiations, he explained the whole matter to the press: it re-

sponded by proclaiming it Japan's choice, whether to accept the Note or fight.³⁴⁴

³⁴⁵ Looked at from the Japanese side of the Pacific, it was Hobson's choice: Japan could only surrender now, or fight to all-but-sure defeat. The Hull Note is a part of history now; let us leave it with a contemporary historian's words: "As for the present war, the Principality of Monaco, the Grand Duchy of Luxemburg, would have taken up arms against the United States on receipt of such a note as the State Department sent the Japanese Government on the eve of Pearl Harbor."

342. Testimony of Ballantine, (Tr. 10,954)

343. Ex. 2863, Tr. 25,624

344. Ex. 2840, Tr. 26,370

345. Ex. 2950, Tr. 26,056

346. Nock, Memoirs of a Superfluous Man (1943) 249.

NEGOTIATIONS AFTER 26 NOVEMBER.

71. Receipt of the Hull Note in Japan put an end to all but the faintest hopes that agreement could be reached with the United States and war averted. Japan -- which, as has been mentioned,³⁴⁷ might have been able to yield still further had she received any response to her concessions already made -- could see no hope if the Hull Note stood. So much was agreed by the Liaison Conference which first considered the Note after its receipt, on 27 November;³⁴⁸ and it was agreed that a decision for war would have to be taken unless meanwhile efforts to secure American reconsideration should succeed. The decision for war was made on 1 December;³⁴⁹ but the efforts to obtain reconsideration, both before and after 1 December, failed. Japan's hardly made offers to relax her stand having all been discarded by the United States as of no account, she had nothing with which to induce reconsideration but whatever effect might come of taking a strong stand by convincing the United States that her firm closing of the negotiations³⁵⁰ was to be regretted.

347. Supra, §57

348. Testimony of YAMAMOTO, Tr. 26,058; TOGO, Tr. 35,706; and TOJO, Tr. 36,358-59.

349. Testimony of YAMAMOTO, Tr. 26,062.

350. Testimony of TOGO, Tr. 35,712.

1 Of the diplomatic correspondence of this
 2 period between Foreign Ministry and Embassy in Washing-
 3 ton there was introduced into evidence a considerable
 4 amount, which the prosecution at the time professed to
 5 view with considerable alarm but in their summation
 6 pass over without special comment. In view of this
 7 recognition of its true importance, it may be simply
 8 disposed of here. The instructions to the Ambassadors
 9 between 27 November and 1 December not to break off
 10 negotiations, despite the probability that such a rup-
 11 ture would be the result of the Hull Note,³⁵¹ are but
 12 recognition of the fact that the Foreign Ministry
 13 could not decide to break off negotiations and to go
 14 to war; until that was decided by the competent author-
 15 ity, negotiations and attempts to negotiate naturally
 16 continued uninterrupted. After the actual decision for
 17 war on 1 December, likewise there remained a hope of
 18 agreement, perhaps infinitesimal but not to work for
 19 the realization of which would have been inexcusable.
 20 This obvious point has been put by Mr. Hull himself,
 21 in saying that even when the situation was "virtually
 22 hopeless" one had to "clutch at straws";³⁵² "we did not
 23 want to overlook the slightest chance,"³⁵³ as Mr.
 24

25 351. Exhibits 1193, Tr. 10,442; 1194, Tr. 10,444; and
 1195, Tr. 10,450.

352. Ex. 2840, Tr. 26,362. 353. Tr. 10,969

1 Mr. Ballantine says. Japan therefore made several
 2 attempts to secure American reconsideration,
 3 suggesting that the negotiations go back to the propos-
 4 als and counter-proposals under discussion before the
 5 Hull Note.³⁵⁴ The significance of this was, of course,
 6 that it had been agreed and was understood by the
 7 Japanese Government and High Command that if the
 8 negotiations should be brought to successful conclu-
 9 sion even after the decision to go to war had been
 10 taken, operational plans for war were to be canceled.³⁵⁵
 11 In view of the eagerness of Japan during the final
 12 part of the negotiations to "clutch at straws" to
 13 save the situation -- as evidenced by the readiness
 14 demonstrated to make basic concessions -- it is not
 15 unreasonable to suppose that even an American willing-
 16 ness to resume negotiations might have sufficed to
 17 bring about suspension of those plans.

18 72. An incident of which the prosecution have
 19 attempted to make much is the recommendation sent by
 20 Ambassadors NOMURA and KURUSU to the Foreign Ministry
 21 on 26 November that to alleviate the tenseness in the

22 354. Testimony of Ballantine (Tr. 10,963)

23 355. Exhibit 809 (Tr. 7988; testimony of YAMAMOTO
 24 (Tr. 26,062); MIYO, Tatsukichi, (Tr. 26,726);
 25 GENDA, Minoru (Tr. 26,750); SUZUKI, Teiichi
 (Tr. 35,225); TOGO (Tr. 35,714) and TOJO
 (Tr. 36,396).

1 situation an exchange of telegrams, expressive of
 2 cordiality, be arranged between President Roosevelt
 3 and an unspecified Japanese authority.³⁵⁶ The con-
 4 crete suggestion which the Ambassadors made was that
 5 the President should wire that he hoped that Japan and
 6 America would cooperate for the maintenance of peace
 7 in the Pacific, to which the Japanese reply would pro-
 8 pose the neutralization of Indo-China, the Netherlands
 9 Indies and Thailand. Quite naturally, the Japanese
 10 Government rejected the suggestion as holding out no
 11 prospect of solution at that time;³⁵⁷ it is curious
 12 indeed that the prosecution have sought to make an
 13 issue of it. The neutralization of Indo-China had of
 14 course been proposed by President Roosevelt as long
 15 before as July, even prior to the Japanese move south-
 16 ward; and it had then been rejected without discus-
 17 sion.³⁵⁸ By November such a proposal would have been
 18 still less acceptable to Japan -- quite aside from the
 19 fact that the Ambassador's suggestion offered no solu-
 20 tion of such difficult related questions as action to
 21 be taken in connection with freezing of assets or steps
 22 which the United States would take toward mediating for
 23

24 356. Exhibit 1189 (Tr. 10,419)

25 357. Testimony of YAMAMOTO (Tr. 26,064); TOGO
 (Tr. 35,704-5, 35,707); and TOJO (Tr. 36,360).

358. Supra, §48.

1 settlement of the China Affair. Withdrawal of troops
 2 from Southern Indo-China alone had with much difficulty
 3 been agreed upon as an item of Proposal "B"; ³⁵⁹ with-
 4 drawal from the whole of Indo-China, with the China
 5 Affair (for terminating which troops had originally
 6 been stationed there) unsettled, and with no American
 7 quid pro quo mentioned, would have been out of the
 8 question. The Ambassadors' proposal was, in any
 9 event, made before they had been handed the Hull Note;
 10 the Government, considering it in the light of the
 11 Hull Note (knowledge of which was simultaneously
 12 received), ³⁶⁰ had no difficulty in rejecting it as
 13 useless. The Ambassadors' report of reception of the
 14 Hull Note, advising that there was no prospect of reach-
 15 ing an agreement "unless the United States wholly
 16 withdraws it" ³⁶¹ is their own abandonment of their
 17 scheme.

18
 19 THE PRESIDENT: We will adjourn until half-
 20 past one.

21 (Whereupon, at 1200, a recess was
 22 taken.)

23 - - -

24
 25 359. Testimony of TOGO (T. 35,687-88).

360. Testimony of YAMAMOTO (T. 26,065) and TOGO (T. 35,704)

361. Exhibit 2,949 (T. at 26,093).

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AFTERNOON SESSION

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The Tribunal met, pursuant to recess, at 1330.

MARSHAL OF THE COURT: The International
Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Major Blakeney.

MR. BLAKENEY: Page 191, Section 73.

A last event to be noted before we come to
the end of the negotiations is the message which
President Roosevelt sent, on the night of 6 December
in Washington, to the Emperor of Japan. Only one or
two points in connection with this message require
discussion. First is that of its probable effect had
it not been delayed, in reaching the Emperor, until
the war was actually commencing. The message was
sent with the professed purpose of seeing whether the
Emperor would not, joining with the President, "give
thought in this definite emergency to ways of dispel-
ling the dark clouds;" the concrete suggestion con-
tained (by inference) in it is again that of with-
drawal of Japanese forces from Indo-China, in return
for United States guarantee (to which the Governments
of the Netherlands Indies, Malaya, Thai and China
would be asked to subscribe) of the security of that

(362. Ex. 1245-J, T. 10825)
(363. Id. T. 10829)

364
colony. Asserting in their opening statement that,
1 "had it been delivered to the Emperor at once, (it)
2 might have changed the course of history",³⁶⁵ the prose-
3 cution now in summation recognize the obvious fact
4 that "in the light of previous events there was nothing
5 to be hoped for in sending this message."³⁶⁶ The idea
6 of neutralization of Indo-China had been proposed by
7 the United States, and rejected, in July; it had been
8 proposed by the Japanese Ambassadors in Washington,
9 and rejected, in November. The reasons which in Nov-
10 ember rendered the proposal inadequate to effect a
11 solution of Japanese-American problems in general,
12 existed yet in December. Neutralization of Indo-China
13 still in December left the China problem unsettled, the
14 freezing of assets in full force. President Roosevelt
15 made no proposal for settlement of those or other out-
16 standing problems; he did not suggest further negotia-
17 tions on any basis whatever; he hinted at no concession
18 which might be made by the United States. Neutraliza-
19 tion of Indo-China might have served the American pur-
20 pose, of relieving the threat which was felt from
21 Japanese troops in Indo-China, but it offered no relief
22 to Japan from the conditions which she considered to
23
24
25 (364. Id. T. 10828-29)
(365. T. 9312)
(366. Summation, SG-139, T. 39686)

1 be driving her to war in self-defense--the inexorable
2 pressure of the economic blockade, the drain of the
3 China Affair. The President's proposal, coming to
4 Tokyo on the night of 7 December 1941, offering no
5 solution for the over-all situation, could be of no
6 assistance.

7 The message, however, was actually received
8 in the Japanese Central Telegraph Office at noon on
9 7 December; and, as has been mentioned, the prosecution
10 were once of the mind to assert that its effect would
11 have been different had delivery to the Emperor not been
12 delayed until night. How the contents of the President's
13 telegram which were the same at noon and at midnight,
14 could have had any different or greater effect twelve
15 or fifteen hours earlier must remain a mystery. The
16 fact is, of course, that the message was the sort of
17 document which governments send for the purpose of
18 putting their positions on record, no more. Mr. Ballan-
19 tine conceded that the State Department "thought that
20 the chances were very slim that it would accomplish any-
21 thing"; and it was actually sent at 9 o'clock in the
22 evening of the day on which at 3 o'clock the State
23 Department had seen the message advising that Japan's
24 final note (with which negotiations would be
25 (367. T. 10969)

1 "practically dropped"³⁶⁸) was on its way.³⁶⁹

2 74. In any event, there is nothing to con-
 3 nect any of the defendants, or indeed any Japanese Gov-
 4 ernment officials, with the delaying of the presiden-
 5 tial message. The proof is clear and undisputed that
 6 this message--and others, the delay being applicable
 7 to all "foreign telegrams" alike--was held up in the
 8 Ministry of Communications on order of the Army Gen-
 9 eral Staff,³⁷⁰ and that the Foreign Ministry not only
 10 had no knowledge of it until a copy of it was delivered
 11 to the Foreign Minister after midnight by the American
 12 Ambassador, but made every effort, after learning of
 13 press reports that such a message was being sent, to
 14 locate it.³⁷¹ (The Foreign Ministry had no knowledge
 15 also of the delaying of foreign telegrams.)³⁷² The prose-
 16 cution rely upon the statement of the witness SHIRAO,
 17 that he knew, "certainly before 6:00 P.M. when I left
 18 the office, and I think some time between four and
 19 six P.M. of the contents of the message."³⁷³ The state-
 20 ment is demonstrably without probative value. The
 21 witness says that his affidavit is based upon his diary;³⁷⁴
 22 the diary shows the entry "it is reported that President

- 24 (368. Ex. 1193, T. 10442) (374. T. 10571)
 25 (369. Testimony of Ballantine, T. 10970-76)
 (370. Testimony of SHIRAO, Tateki, T. 10569)
 (371. Testimony of KASE, Toshikazu, T. 26167, and
 KAMEYAMA, Kazuji, T. 26186)
 (372. Testimony of TOGO, T. 35730)
 (373. T. 10570)

1 Roosevelt highhandedly sent a personal message to
 2 His Majesty and moreover, disclosed the strength of
 3 the Japanese troops stationed in French Indo-China,
 4 the movement of the Japanese convoy, etc.³⁷⁵ In his
 5 affidavit the witness remembered that "Colonel TOMURA
 6 of the War Ministry (it proved later to be the General
 7 Staff)³⁷⁶ was telling me the contents of the telegram
 8 probably by 4 o'clock . . ."³⁷⁷; but on cross-examination
 9 he admitted that "my memory was foggy and I couldn't
 10 remember exactly what happened, therefore I put it
 11 down that I may have heard it from Colonel TOMURA"³⁷⁸
 12 (he did not put it down that he "may have heard it").
 13 If we compare the diary entry with the press report,
 14 already available in Tokyo in the morning,³⁷⁹ of the State
 15 Department announcement of the sending of the message
 16 by the President, the source of SHIRAO's knowledge is
 17 readily evident. The State Department had announced,
 18 as reported by Ambassador NOMURA to the Foreign Min-
 19 istry, that "the President had dispatched a personal
 20 telegram to His Majesty the Emperor. The contents of
 21 the message are unknown, but it is generally assumed
 22 that it concerns the reinforcement of troops in French
 23
 24 (375. Ex. 1226, T. 10604)
 25 (376. T. 10584)
 (377. T. 10571)
 (378. T. 10584)
 (379. Testimony of KASE, T. 26167, and TOGO, T. 35727)

1 Indo-China and the advance into Thailand, in view of
2 the simultaneous disclosure by the Department, based
3 on information received, that in addition to one hun-
4 dred twenty-five thousand troops already stationed in
5 French Indo-China, two corps were moving this morning
6 into the Gulf of Siam . . . "³⁸⁰

7 Exactly what SHIRAO heard--but not what the
8 contents of the President's message proved to be!

9 Finally, the prosecution allege (without cit-
10 ing any evidence in support of the statement) that
11 "notice of the message was broadcast by radio in Japan
12 at 3 in the afternoon.³⁸¹ If this be true--which is
13 probable--it could account for SHIRAO's knowledge,
14 if he had any, for that of Colonel TOMURA (if it was
15 he from whom SHIRAO heard it, if he did hear it) and
16 for that of "the conspirators". It has not been denied
17 that the Foreign Ministry, and perhaps other branches
18 of the Government, knew of the fact of the sending of
19 the message; much testimony was indeed given to detail
20 the action taken as a result of acquisition of that
21 knowledge. But from the fact of the alleged radio
22 broadcast announcing the sending of the telegram the
23 prosecution go on to the egregious non sequitur that
24 "there can be no doubt that its contents were known
25

(380. Ex. 2962, T. 26169)

(381. Summation, SG-138, T. 39685)

382

to the conspirators by 1800" -- that is, the contents
 1 of the President's message had been broadcast? At all
 2 events, this radio broadcast giving knowledge of the
 3 contents of the message destroys at once "the con-
 4 spirators'" motive for delaying the message itself and
 5 any inference of guilty knowledge of theirs if they did
 6 know its contents "not later than 1800".

7
 8 75. The Japanese-American negotiations, which
 9 had in fact been ended by the Hull Note, were formally
 10 terminated only after the war had commenced, by service
 11 of the final Japanese note, of declaration of war.

12 This document having been analyzed and the peculiar
 13 circumstances surrounding its late delivery discussed

383

14 elsewhere, those matters need not be dwelt upon here.

15 One or two additional points, however, require some
 16 attention, a brief recapitulation of some of the evi-
 17 dence being therefore necessary.

18 The final note was drawn and prepared in ac-
 19 cordance with the agreed opinions of all participants
 20 in the Liaison Conference; the time for its delivery
 21 had been decided by the High Command, and approved by

385

22 (382. Ibid.)

23 (383. Summation for the defense, Section "E", "On Some
 Questions of International Law", §§15-22, T.42439-64)

24 (384. Testimony of YAMAMOTO, T. 26125)

25 (385. Testimony of YAMAMOTO, T. 26126-27, MUTO,
 T. 33174-75, TOGO, T. 35716, 35721-22, and
 TANABE, T. 35567)

386

the Liaison Conference upon the assurance that the time
 1 so set would allow a sufficient interval before com-

387

2 mencement of hostilities. The Foreign Ministry took
 3 the necessary steps to insure the delivery of the mes-
 4 sage to the United States at the agreed time, steps
 5 dictated by prudence to avoid premature disclosure but
 6 based upon calculations, of the time necessary for de-
 7 ciphering and typing, which proved remarkably accurate.
 8

387a

9 That in the end the message was delivered late--more
 10 than an hour after the time instructed by the Foreign
 11 Ministry to the Embassy--is shown by all the evidence
 12 to have been the result of neither malice nor negli-
 13 gence of any defendant, but on the contrary of the most
 14 criminal recklessness in the Embassy in Washington.
 15 It is nevertheless necessary to advert to some of the
 16 inferences which the prosecution, attempting in despera-
 17 tion to sustain their cherished theory of a conspiracy
 18 to insure late delivery of that document, propose should
 19 be drawn from the evidence.

387b

20 76. After conceding that the Embassy in Wash-
 21 ington had not put itself in that state of vigilance

22 (386. Testimony of YAMAMOTO, T. 26096, 26127-28, TANABE,
 23 T. 35567, and TOGO, T. 35722)

24 (387. Testimony of MUTO, T. 33176, TANABE, T. 35567,
 25 and TOGO, T. 35706, 35721--and see §80 of his
 affidavit, T. 35723-24, 35848-52, 35912--cf.
 T. 36141)

(387a. Testimony of KAMEYAMA, T. 26186)

(387b. Testimony of YUKI, Shiroji, T. 26207)

obviously appropriate to the times, the prosecution contend notwithstanding that the Foreign Ministry was derelict in having taken the obvious precaution of ordering the declaration of war prepared for delivery without the use of typists; thereby, it is suggested, making upon the non-professional typists of the diplomatic staff demands which they could not be expected to meet in time. (The prosecution say that preparation of the note was left to be made by "members of the Embassy who were admittedly incompetent as typists.")

The evidence on the contrary is that the one who typed the note was the one senior member of the Embassy staff "who could operate a typewriter at all decently", which is submitted to be the opposite of confessed incompetence.) As against this interesting theory, the evidence introduced on behalf of the defense shows that, after ample warning of its impending arrival and importance, the message began coming in at the Embassy in the afternoon of 6 December, and was except for its last seventy words deciphered by midnight, at which

(387c. Summation, SG-146, T. 39695)

(388. Testimony of YUKI, T. 26211-12)

(389. The "pilot message" alerting the Embassy for arrival of the declaration of war had been "deciphered by noon of 6 December (Saturday)". Testimony of YUKI, T. 26209)

(390. Exs. 1216, T. 10534, and 1217, T. 10536)

(391. Pt. 14 of the Message, which alone did not arrive on the night of the 6th, consists of 70 words. See Ex. 2966, T. 26198, not read, which is Part 14.)

(392. "...the deciphering of the first 13 parts being finished before midnight." Tes. of YUKI, T. 26211)

1 time typing might and but for inexplicable negligence
 2 would have commenced (the typing of the first eight or
 3 nine parts of the thirteen might in fact have started
 4 at 7 o'clock or even earlier³⁹³). The typing, when finally
 5 undertaken the following morning, required even under
 6 pressure of the dawning realization of the gravity of
 7 the negligence only some two hours -- from about 9 to
 8 11 o'clock³⁹⁴ -- for parts 1 to 13. (On the ground that
 9 a clean copy was needed, this was completely retyped
 10 after 11 o'clock³⁹⁵.) That is, had typing commenced even
 11 at midnight, all but the fourteenth part of the message
 12 would have been ready by 2 o'clock of the morning --
 13 or, if we allow for typing two drafts, by 4 o'clock.
 14 The two errors which had to be corrected -- it has not
 15 yet been suggested that these were made deliberately
 16 by Tokyo to insure more delay -- could then have been
 17 corrected in good time, for the telegrams of correction
 18 had arrived and been deciphered by 11 a.m.³⁹⁶ (These two
 19 errors, which were considered to make necessary the
 20 retyping of several pages of the document³⁹⁷, consisted
 21 (393. "... the first 8 or 9 parts had already been
 22 deciphered by dinner-time (about 7 p.m.) that evening."
 23 Id. T. 26210)
 24 (394. Id. T. 26212-13)
 25 (395. Id. T. 26213)
 (396. Id. T. 26212)
 (397. Id. T. 26213)

of a change of one word and addition of one line.³⁹⁸

The corrections could obviously have been inserted in ink in the original draft between 11 and 1 o'clock.)

Finally, the fourteenth part was deciphered by 12:20³⁹⁹
or 12:30 p.m.,⁴⁰⁰ and could have been typed -- seventy words! Eight lines of this text -- by anyone in time for 1 o'clock delivery.

(398. Testimony of KAMEYAMA, T. 26191-92)

(399. Id. T. 26201)

(400. Testimony of YUKI, T. 26214)

1 But, we are told -- "most important of all" --
2 the Foreign Ministry gave to the fourteenth part of the
3 message "a priority of only 'very important', while
4 giving other messages of much less importance urgent
5 classification."⁴⁰¹ Such a complete distortion of the
6 evidence would be ludicrous were it not so serious a
7 matter. What are the facts? First, that there is no
8 evidence that the fourteenth part was or was not
9 indicated as "Urgent". However that may be, other
10 messages were classified as "Urgent" -- in cipher! The
11 classification itself is in cipher. On this message
12 "appeared the plain English phrase 'Very Important!'"⁴⁰²
13 With all other messages the cable-clerks must decipher
14 enough of the preliminary matter to discover whether
15 they were dealing with "urgent", "priority" or "routine"
16 material; not so with this one. They had to decipher
17 not one word of this fourteenth part to discover its
18 supreme urgency; it leaped out at them, from the page
19 of the meaningless figures of cipher-groups, that one
20 intelligible word in the whole sheaf of papers, that
21 plain and arresting warning, "Very Important!" It is
22 the only "plain English" -- or indeed un-enciphered --
23 phrase discoverable in the whole diplomatic correspondence;
24
25 401. Summation, SG-164 (Tr. 39,696).
402. See the fourteenth part, Ex. 2966 (Tr. 26,198).

1 it might as well have been written in red, it could not
 2 be missed. Is the classification "urgent" the higher
 3 one in such case? But if, as appears to have happened,
 4 the cable-clerks did by some incredible stupidity defer
 5 the message labelled "Very Important!" to others less
 6 urgent ⁴⁰³, is there any fault in Tokyo? Part 14 duly
 7 arrived over the air-waves in the United States at
 8 3:05 a.m., Washington time ⁴⁰⁴, and was deciphered by
 9 the United States Navy and delivered beginning at 8:15
 10 in the morning ⁴⁰⁵. What the American Navy, working
 11 under the added handicap of having to break a secret
 12 foreign cipher, could do, the Japanese Embassy with
 13 ordinary diligence could have done (Part 14 arrived
 14 at the Embassy "by about 7 a.m." ⁴⁰⁶). It is interesting
 15 to note that the actual time required for all decipher-
 16 ing and typing is well within the estimate of the Chief
 17 of the Cable Section of the Foreign Ministry -- the
 18 estimate upon the basis of which he ordered the times
 19
 20
 21

22 403. Testimony of YKI (Tr. 26,212).

23 404. Ex. 2,968 (Tr. 26,230).

24 405. Ex. 2,969 (Tr. 26,232).

25 406. Testimony of KAMEYAMA (Tr. 26,201).

407
 1 for transmission of these several cablegrams . Every
 2 detail worked out as he had planned it -- every detail
 3 save one: that he had not counted on the Embassy's
 4 bland violation of the Foreign Ministry's order to
 5 keep cable-clerks on duty at all times, and to prepare
 6 this document beforehand for delivery 408 . Given
 7 obedience to either order, all would still have been
 8 well. Had only the typing commenced on the night of
 9 the 6th, the cable-clerks might have made holiday
 10 from midnight to morning and the job been finished in
 11 time. Had those clerks stayed on duty as ordered; and
 12 had they then even consumed the three hours and a half
 13 that on the following morning they devoted to the
 14 leisurely deciphering of half-a-dozen simple messages;
 15 and even had the novice typist OKUMURA still been

407. Id. (Tr. 26,195-201). A reading of KAMEYAMA's
 17 testimony in connection with Exhibits 2968 and 2969,
 18 showing the times of receipt and of delivery by the
 19 Navy of the various messages, and of the testimony
 20 of YUKI (Tr. 26,207-15), showing the times of com-
 21 pletion of deciphering and, inferentially, of arrival
 22 at the Embassy, is most instructive as showing the
 23 remarkable accuracy of his assumptions, which err only
 24 slightly on the conservative side.

408. "The Embassy had been instructed to the effect
 22 that there should always be some clerks on duty in the
 23 cable section. Moreover, an instruction had been
 24 sent to the effect that the document and all the
 25 necessary preparations were to be made ready before-
 hand (Ex. 1216)." Testimony of KAMEYAMA (Tr. 26199).
 The members of the cable section "returned to their
 respective lodgings before dawn, leaving a duty
 officer . . . At from 9:30 to 10 they had all gathered
 in the office. . ." Testimony of YUKI (Tr. 26211-12).

unwilling to defer his night of sleep to the fate of
1 his Empire -- Ambassador NOMURA might yet have kept
2 his appointment with Hull and with history. ⁴⁰⁹ By
3 such trifles is the destiny of nations shaped.

4 What becomes of the conspiracy in Tokyo to
5 bring about delay?

6 CONCLUSIONS

7 77. If our analysis of the negotiations has
8 been sound, stating the conclusions need not detain us
9 long. Our conclusions on these narrow, limited issues
10 must, however, be briefly related to certain of the
11 broader aspects of the case, with particular reference
12 to the positions adopted by the prosecution. A reading
13 of the prosecution's summations as a whole must con-
14 vince one that the entire case proceeds upon a post
15 hoc, ergo propter hoc principle: The Japanese Imperial
16 Conference decisions of 2 July, 6 September and
17

18 409. By 8:15 a.m. the United States Navy had completed
19 deciphering, among other messages, the fourteenth part
20 and the telegrams of correction (Exhibit 2969, Tr.
21 26,232). The Embassy cable-clerks should have com-
22 pleted them at least as early; so that by 8:15 the
23 entire text as corrected would have been ready for
24 typing. Allowing for the typing the two hours it
25 actually took, a final draft could then have been
prepared by 11 o'clock (no recopying to make correc-
tions then being necessary), even had the work
started only at 9, as in fact it did. (It should
moreover be noted that according to the estimate
of KAMEYAMA -- who, of course, is an expert -- the
lot of these messages received in Washington after
midnight of 6-7 December could have been deciphered
with one machine in two hours or so. Tr. 26,198.

5 November 1941 decided upon preparations for war
1 against the United States and the British Empire, and,
2 in certain contingencies, upon war; the war came;
3 ergo, it was never intended that it should fall out
4 otherwise. Having this premise in mind, we trace
5 out the negotiations; each Japanese proposal must, of
6 course, have been narrower than the last, since the
7 negotiations were but a comouflage; it is monstrous
8 to say that Japan ever made any concession, she having
9 started out with her fixed conception of what she must
10 have; if Japan offered a concession in the course of
11 the negotiations, it cannot have been sincere, since
12 ex hypothesi she was determined to gain her full demands,
13 by war if need be. Now, this sort of thing does not
14 advance the case. The merest reading of the 6 September
15 Imperial Conference decision, as put into evidence by
16 the prosecution themselves⁴¹⁰, suffices to destroy
17 the basic premise: it was not carried out; the study
18 of the negotiations which we have just made will, it
19 is submitted, dispel any suspicion that the conclusions
20 are correct.
21
22

23 78. The prosecution have, as has been men-
24 tioned, proposed the test of whether Japan made con-
25 cessions in her negotiations with the United States as
410. Ex. 779 (Tr. 7,904).

1 the measure of her desire for peace. It fully appears
2 from the evidence which has been reviewed that there
3 was on the Japanese side no failure of comprehension
4 that "negotiation" is "give-and-take". The original
5 Japanese position was that to those who would under-
6 stand her, she would make concessions even at the ex-
7 pense of logic. We have seen the extent to which
8 concessions were made during seven months of negoti-
9 ations. Of course, there is no pretence that she
10 conceded every point; but her concessions were many,
11 and substantial, and sufficient to furnish incontro-
12 vertible proof of a conciliatory disposition. At
13 America's request, Japan had shown readiness to
14 render her Tripartite Pact obligation a dead letter.
15 At American insistence, Japan abandoned her claims to
16 special commercial and trade rights in the Asiatic
17 area, agreeing to share access to those markets equal-
18 ly with the United States. Japan gradually contracted
19 her minimum claims of what she must have out of the
20 China Affair which -- rightly or wrongly -- she had
21 fought at vast sacrifice for over four years. Con-
22 formably to the American demand, Japan was willing by
23 retreat to undo the damage done to relations by her
24 advance into southern Indo-China, restoring the status
25 quo ante.

1 These are not all; we may pick out from many
 2 others a few minor points on which Japan made conces-
 3 sions during the negotiations. The subject of "political
 4 stabilization in the Pacific area," for example, had
 5 been one to which a clause was devoted in the various
 6 proposals from the original one of 9 April. It assumed
 7 various guises: first a pledge of non-acquiescence in
 8 transfer of Pacific territory to a European Power⁴¹¹ ;
 9 then a guarantee of the independence of the Philippine
 10 Islands on condition of their permanent neutraliza-
 11 tion⁴¹² ; a statement of peaceful intention and denial
 12 of territorial aspirations⁴¹³ ; finally, in the Japanese
 13 25 September draft, a pledge not to resort to measures
 14 jeopardizing "stabilization" of "the situation in the
 15 Southwestern Pacific area"⁴¹⁴ . The United States had,
 16 in accordance with its position that any agreement to
 17 be made should be applicable to the entire Pacific,
 18 suggested the amendment of this draft; but nothing had
 19 been done toward it when the TOJO Cabinet took office.
 20 When it had been decided by that Cabinet to resume
 21 negotiations on the basis of the 25 September proposal,
 22 the Foreign Minister authorized the amendment desired
 23

24 411. Ex. 1059 (Tr. 9,859).

412. Ex. 1070 (Tr. 9,897).

25 413. Ex. 1078 (Tr. 9,944).

414. Ex. 1245I, (Tr. 10,790).

415

by the United States⁴¹⁵, and the Secretary of State was
 1 handed a memorandum to that effect on 17 November⁴¹⁶.

2 As another small illustration, the Japanese proposal
 3 of 12 May contained a clause which had immediately
 4 suggested difficulties to the Department of State:
 5 "Japanese immigration to the United States shall
 6 receive amicable consideration -- on a basis of
 7 equality with other nationals and freedom from dis-
 8 crimination"⁴¹⁷. This clause, as the result of
 9 American objection, was deleted and appeared in no sub-
 10 sequent Japanese proposal.
 11

12 79. Another interesting evidence, not yet
 13 discussed, of the Japanese desire to conclude a peace-
 14 ful settlement, was the proposed meeting between Premier
 15 Prince KONOYE and President Roosevelt. Such a confer-
 16 ence had been a feature of the original draft pro-
 17 posal⁴¹⁸, but had been omitted in the first Japanese
 18 counter-proposal⁴¹⁹ and thereafter. After the sus-
 19 pension of negotiations in July, however, Prince KONOYE
 20 conceived the idea of proposing such a meeting in the
 21 hope that it might produce the results which negoti-
 22 ations through normal diplomatic channels had failed
 23

24 415. Ex. 2938 (Tr. 26,025)

25 416. Ex. 2939 (Tr. 26,026).

417. Ex. 1070 (Tr. 9,898).

418. Ex. 1059 (Tr. 9,860).

419. Ex. 2871 (Tr. 25,691).

to do. There was much discussion of the matter, which
 1 need not be touched on here; it is sufficient for now
 2 to note that when Ambassador NOMURA first conveyed the
 3 suggestion to President Roosevelt it was received
 4 with some enthusiasm ⁴²⁰, but that the United States
 5 soon began to say that the meeting would be useless
 6 unless the pending questions were in effect decided in
 7 advance ⁴²¹. It was at the time widely felt -- as for
 8 example by Ambassadors Grew ⁴²² and Craigie ⁴²³ -- that
 9 Prince KONOYE, by being able to give direct to the
 10 President far broader assurances and commitments than
 11 could be done through the diplomatic process, was
 12 offering an opportunity for peaceful settlement which
 13 it would be folly to reject. For some reason --
 14 ⁴²⁴ Mr. Ballantine gives several -- the State Depart-
 15 ment did not agree, and the meeting never materialized.
 16 The significance, however, as a token of desire for
 17 peace of a Japanese Premier's being ready to leave
 18 his country on such a startlingly unprecedented mis-
 19 sion will not be lost on the Tribunal, as it was not
 20 lost on the experienced American and British representa-
 21 tives in Tokyo. Ambassador Grew urged that the proposal
 22
 23 420. Ex. 2888 (Tr. 25,776).
 24 421. Exs. 2893 (Tr. 25,794) and 2894 (Tr. 25,798).
 25 422. Ex. 2837 (Tr. at 25,385).
 423. Ex. 2908 (Tr. 25,847)
 424. Tr. 10,775-77.

"not be turned aside without very prayerful consideration. . . The good which may flow from a meeting between Prince KONOE and President Roosevelt is incalculable"⁴²⁵. To Ambassador Craigie it was "the best chance of bringing about a just settlement of Far Eastern issues, which has occurred since my arrival in Japan"⁴²⁶, "a chance which it would be inexcusable folly to let slip."⁴²⁷

425. Ex. 2892 (Tr. 25,791)
426. Ex. 2908 (Tr. at 25,850)
427. Id. (Tr. at 25,852).

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80. It is, however, on the negotiations after the advent of the TOJO Cabinet that the prosecution concentrate their fire. This being the period in which Japan's greatest concessions were made, we are happy to meet them there. To go back a moment, it will be remembered that when the original draft proposal of 9 April had arrived in Tokyo, the consensus of the Liaison Conference was that negotiations on the basis of it should be undertaken with the objects of putting the speediest possible end to the China Affair, of avoiding -- not of facilitating, of avoiding -- a war with America, and of preventing extension of the European war to the Pacific.⁴²⁸ By October these necessities were even more urgent, and consequently the really basic concessions were made after that time.

The major concessions on the economic activities⁴²⁹ and China⁴³⁰ questions were, as we have seen, made during this time; during the TOJO Cabinet's days for the first time Japan abandoned such long-standing claims, offensive to the United States, as those of the right to indefinite troop-stationing in China and of her special position in trade and commerce arising out of propinquity to China; now for the first

428. Ex. 2866 (Tr. at 26,694-96).

429. Supra, §54.

430. Supra, §§55-56.

1 time she offered an immediate retreat by withdrawal of
2 troops, from southern Indo-China. During this period
3 Mr. Hull's cherished ideal of world-wide free trade was
4 accepted by Japan to be applied between the parties,
5 as was the principle of political stabilization
6 throughout the Pacific area. These things show the
7 absurdity of the prosecution's position that the "cabinet
8 under TOJO's leadership proceeded to carry out the
9 policy of September 6";⁴³¹ it is simply untrue, and
10 utterly without foundation in the evidence.

11 But, say the prosecution, the Imperial Con-
12 ference of 5 November decided on war, and that deci-
13 sion was carried out; hence there can have been no
14 bona fide negotiation thereafter. The basic conces-
15 sions made after 5 November -- by the proposals adopted
16 on that day and otherwise -- of course defeat this
17 argument. A conditional decision for war is a con-
18 ditional decision; that the condition is later realized
19 does not convert the original decision into one uncon-
20 ditional ab initio. It is true that the condition so
21 fell out that there was war; but the evidence shows
22 earnest efforts for the success of the negotiations
23 meanwhile, which would have nullified the conditional
24 decision.
25

431. Summation, §G-115 (Tr. 39,654).

1 These facts have been artfully dodged by the
 2 prosecution, who find it more pleasant to repeat, post
 3 hoc, ergo . . . There are other unpalatable facts.
 4 It is interesting, for example, to note that it is no-
 5 where shown by evidence nor contended in argument that
 6 the United States ever in the course of the negotiations
 7 made any concession whatsoever. On the contrary, in
 8 this game of give-and-take the United States position
 9 is proudly stated to have been adamant from first to
 10 last -- it was ultimative. By 21 June the State Depart-
 11 ment had reached "the end of the thinking out and dis-
 12 cussions" of the subject matter, and on that date
 13 presented what was "up to the time of our November 26
 14 proposal, our last complete proposal."⁴³² Negotiate?
 15 Yes -- but "our attitude on that was the same from the
 16 beginning to the end";⁴³³ "from the very beginning
 17 of the conversations we told the Japanese that every-
 18 thing must conform to our fixed principles . . . We
 19 never talked to them in terms of the concessions we
 20 would make from our principles";⁴³⁴ "we would be willing
 21 providing it conformed to our fixed principles."⁴³⁵
 22 Is this negotiation, or is it ultimatum?

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 25 432. Testimony of Ballantine (Tr. 10,884).

433. Id. (Tr. 10,998).

434. Id. (Tr. 11,159).

435. Id. (Tr. 11,003).

1 81. The Japanese proposals "A" and "B" of
2 5 November have been repeatedly alleged in cross-
3 examination and in summation, to have been final,
4 the last word of Japan. America's last word, of course
5 -- as Mr. Ballantine has said -- came in June; but
6 Japan's is not shown to have come at all. Final, yes,
7 these proposals, in the sense that they represented
8 the general outline of matters in which concession
9 could be made; but those were exactly the matters of
10 interest to the United States. What the "last-word"
11 argument overlooks is the fact, well established by
12 the evidence, that there was an understanding between
13 Foreign Minister TOGO and Premier TOJO that if the
14 United States manifested interest in or receptiveness
15 to those proposals the matter of further concession
16 might be taken up. We know now that the United States
17 showed no interest; but they did not know then that
18 she would not -- rather, it is submitted, they had every
19 reason to suppose that she would. There is no proof
20 whatever that this intention was not genuine; on the
21 contrary, the far-reaching concessions already made
22 indicate the great probability that there might well
23 have been still further yielding in response to any
24 suggestion of an attitude of reciprocal give-and-take.
25

The evidence being against the prosecution

1 position that the TOJO Cabinet decided on war at the
2 outset and never seriously made any effort to avoid
3 it by negotiation, they have proved and now argue a
4 number of irrelevant matters which might be supposed
5 to have some prejudicial effect. An example is the
6 reliance -- naive if it were not disingenuous -- which
7 they profess to place on Ambassador NOMURA's presen-
8 tation of his resignation at the time of the change of
9 government. That ambassadors do resign with the
10 administration which appointed them the Tribunal knows,
11 if the prosecution do not; but the prosecution profess
12 to have discovered in the Admiral's request to be
13 allowed to resign the proof that he thought the TOJO
14 Cabinet one under which successful termination of the
15 negotiations was hopeless. It might be supposed that
16 what the Ambassador thought was in any event of small
17 interest, he being by the prosecution's standard -- as
18 a high-office holder of Japan -- a fellow conspirator
19 of the defendants. He appears, however, to have had
20 psychic powers: he knew the situation in Tokyo not-
21 withstanding he had been in Washington, and not in
22 Japan, for some nine months when the TOJO Cabinet
23 came into office; he had not attended the meetings of
24 the Liaison Conference or Imperial Conference where
25 Japan's basic policies were deliberated and decided,

he knew nothing of the Imperial Conference decision
 of 6 September, with its limitations upon the scope of
 Japanese diplomatic action; he was unaware that General
 TOJO, receiving the Imperial mandate to form a cabinet,
 was directed to undertake reconsideration of that
 decision,⁴³⁶ and that some members of his cabinet had
 accepted their portfolios upon the sole condition that
 that should be done sincerely;⁴³⁷ he did not and could
 not know what the attitude of the new cabinet toward
 the negotiations would be, for the cabinet itself did
 not yet know. If his submission of a resignation in
 those circumstances evidences a psychic sense, it was
 one which operated better at long range than on the
 morning of 7 December, when -- after being told
 repeatedly to destroy his codes and code machines,^{437a}
 after being told repeatedly that the fate of his Empire
 hung on the success or failure of his efforts,^{437b}
 after being told that the message which he had by then
 already received would in effect rupture the negotiations,^{437c}

436. Ex. 1154 (Tr. at 10,292); testimony of TOJO
 (Tr. 36,308-9).

437. Testimony of KAYA (Tr. 30,648-49), SHIMADA
 (Tr. 34,653-55), TOGO (35,671-72) and TOJO (Tr.
 36,308-9, 36,314-15).

437a. Exs. 1211 (Tr. 10,524) and 2974 (Tr. 26,258-65);
 testimony of KAMEYAMA (Tr. 26,197).

437b. E.g. exs. 2924 (Tr. 25,960), 2925 (Tr. 25,964),
 2926 (Tr. 25,971), 1174 (Tr. 10,356) and 1178
 (Tr. 10,380).

437c. Ex. 1193 (Tr. 10,442).

1 after receiving cablegrams of greeting and farewell
2 from his colleagues in Tokyo --^{437d} when, after all this,
3 he remained the one man in Tokyo or Washington who up
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437d. Testimony of KAMEYAMA (Tr. 26,197) and YUKI
(Tr. 26,212).

to noon of 7 December did not know that war was coming. ⁴³⁸

Of course, his telegram of resignation contains no implication such as the prosecution attach to it; it is but the normal, humbly-phrased Japanese form of submission of his post to the incoming cabinet for its disposition.

Another curious point is the prosecution's emphasis upon the dispatch to Washington of Ambassador KURUSU, which is alleged to have been a "camouflage," designed to conceal war preparations. What a preposterous position this is needs no argument, for the evidence speaks for itself. Admiral NOMURA himself had long before requested that he be given professional diplomatic assistance and had named Mr. KURUSU specifically; ⁴³⁹ Foreign Minister TOYODA had at one time made preparations ⁴⁴⁰ to send someone. What more natural, so soon as there were new proposals, and negotiations were to begin again, than that a career diplomat should be sent? And, natural or not, how could it be camouflage? Foreign Minister TOGO told Ambassador Grew that Ambassador KURUSU was taking no new proposals; ⁴⁴¹ Ambassador NOMURA ⁴⁴² told President Roosevelt the same; and Ambassador KURUSU himself after his arrival suggested as much to

438. *Sapra*, §75. 442. Ex. 2927 (Tr. 25,985).

439. Ex. 2921 (Tr. 25,952).

440. Ex. 2922 (Tr. 25,953).

441. Exs. 2918 (Tr. 25,927) and 2923 (Tr. at 25,958).

443
 1 the President. Perspicuous camouflage, sending a man
 2 who says, "I bring nothing but a new point of view" --
 3 and brings nothing else! We may let Mr. Ballantine
 4 dispose for us of the whole question of Japan's nego-
 5 tiations as "camouflage."

6 "Q And the negotiations, or the appearance of
 7 negotiations, were designed, did you think, to conceal
 8 the military preparations?

9 "A Not to conceal military preparations.
 10 Those had been obvious since July . . ."
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11 Another of these substitutes for evidence of
 12 Japanese determination from the outset on war is the
 13 prosecution's insistence on the fact that the naval task
 14 force which later struck at Pearl Harbor was setting
 15 sail from Hitokappu Bay on about 25 November, which
 16 was also the day fixed some time earlier by the Foreign
 17 Ministry for the Ambassadors in Washington to conclude
 18 their negotiation of an agreement. The reason for this
 19 so-called deadline has been explained by the Foreign
 20 Minister, Mr. TOGO, in his testimony, 445 which shows it
 21 to have had no connection with naval operations, of which
 22 he and the government had no knowledge. 446 No evidence
 23 tends to contradict this testimony, the prosecution
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25 443. Ex. 2942 (Tr. at 26,037).

444. Tr. 10,965.

445. Testimony of TOGO (Tr. 36,099). The correctness of
 this explanation is accepted by the prosecution, see
 Summation SWW-21 (Tr. 41,902).

446. Id. (Tr. 35,702).

1 contention that there was a connection being based
2 solely on the coincidence of date. What is nowhere
3 explained is why, if the "deadline" was dependent upon
4 the naval movements, it should have been the day of
5 the fleet's departure. If the "deadline" had been the
6 day, say, before the attack, one could appreciate the
7 connection, there would be logic in the argument of
8 circumstances; not when it is a fortnight before. The
9 "deadline," in any event, was subsequently changed, at
10 a time when it appeared that there might be a possibility
11 of agreement on a modus vivendi,⁴⁴⁷ thus making it fully
12 apparent that there was no connection with fleet
13 operations. It is no secret that operational prepara-
14 tions had been carried forward concurrently with the
15 diplomatic negotiations since the 6 September decision,
16 at the latest;⁴⁴⁸ but those preparations, based upon a
17 conditional decision to declare war in future, in no
18 way bear upon the sincerity with which negotiations
19 were simultaneously being conducted.
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21 32. A further word must be said of the United
22 States' attitude in the negotiations, and we have done.
23 It will be apparent from study of the conversations
24 and proposals that the American position, never

25 447. Ex. 1183 (Tr. 10,399).

448. Testimony of TOGO (Tr. 35,702).

1 conciliatory ("we never talked to them in terms of
 2 the concessions we would make"), stiffened perceptibly
 3 from August. This was the month of the Atlantic Con-
 4 ference,⁴⁴⁹ where joint British-American action against
 5 Japan undoubtedly was on the agenda.⁴⁵⁰ As the negotia-
 6 tions progressed, moreover, American doubts of Japanese
 7 sincerity multiplied;⁴⁵¹ America had, as we now know,
 8 overreached herself in attending, not to what Japan's
 9 Ambassadors said to her, but to the grotesque parodies
 10 which she thought were the Ambassadors' instructions.
 11 It is difficult to escape the conclusion that from this
 12 time, at all events, the United States had determined on
 13 yielding nothing even at the risk of war. Even before,
 14 there had been baffling moods -- as when the proposal
 15 for neutralization of French Indo-China was made on
 16 24 July, and Japanese assets frozen on the following
 17 day without any answer's having been awaited. But from
 18 August the United States' position began to shift rapidly
 19 and inexplicably. Where before the recognition of
 20 Manchoukuo had been "a question between China and
 21 Japan,"⁴⁵² America started prescribing peace terms
 22 without consultation with China -- and those terms

24 449. Ex. 2322 (Tr. 17,465).

25 450. Evidence to this effect was rejected by the Tribunal (Tr. 26,382-85).

451. Testimony of Ballantine (Tr. 11,014).

452. Id. (Tr. 10,999).

1 continually stiffer, until in the Hull Note they were
2 the terms of total defeat. Originally America's desire
3 had been only for such an agreement with Japan as would
4 assure her own interests, questions affecting other
5 countries being left for settlement with them; now the
6 United States undertook to secure the neutralization
7 of French territories and Thailand without a "by your
8 leave." America mentioned her hopes for world-wide
9 freedom of commercial opportunity; when Japan offered
10 to make them contractual, her meaning was "unclear."

11 The evidence seems to suggest two explanations
12 for this state of affairs, neither being such as to
13 convict Japan of having blocked an agreement. One was
14 suggested above,⁴⁵³ in referring to Ambassador Grew's
15 recommendations to the State Department on 6 September
16 that the opportunity of a KONOE-Roosevelt meeting be
17 seized. He had said, it will be remembered, that "it
18 is obvious . . . that no Japanese undertakings whether
19 oral or in written form can be accepted as giving a
20 complete guarantee that such undertakings can or will
21 be carried out . . .";⁴⁵⁴ it was a question whether the
22 commitments, if implemented, would be satisfactory.
23 Japan never got the chance to implement any commitment.

25 453. Supra, §33.

454. Ex. 2896 (Tr. 25,807).

455. Testimony of Ballantine (Tr. 10,992).

1 Her offers of commitments came more and more to be
 2 treated as valueless because they might not be imple-
 3 mented after being given. The meaning of her most
 4 basic concessions of principle was never explored; it
 5 was assumed that they could not be sincere. As America
 6 came to feel more ready for war -- we may surmise --
 7 her position became the more uncompromising, her interest
 8 in the negotiations waned ever more, until at last the
 9 State Department was willing to abandon untried its own
 10 proposal of modus vivendi, which Mr. Hull had thought
 11 might have perhaps a one-in-three chance of acceptance,⁴⁵⁵
 12 for the Hull Note which was considered "unlikely" of
 13 acceptance.⁴⁵⁶ Why, then, did America negotiate? "The
 14 main difficulty appears to be that, while the Japanese
 15 want speed and cannot yet afford to go beyond general-
 16 izations, the Americans seem to be playing for time
 17 and to demand the utmost precision in definition before
 18 agreeing to any contract for a step of rapprochement."⁴⁵⁷
 19 Though it sound like an echo of the Japanese complaints
 20 of the American attitude in the negotiations,⁴⁵⁸ it is
 21 Ambassador Sir Robert Craigie speaking. Can his analysis
 22 be challenged?
 23

24 455. Testimony of Ballantine (Tr. 10,992).

25 456. Id. (Tr. 10,952).

457. Ex. 2908 (Tr. 25,849).

458. Ex. 2918 (Tr. at 25,930).

1 "Playing for time"? The whole theory of the
2 prosecution of this case has been that Japan, her
3 civilian and military officials, the defendants -- the
4 "conspirators" -- conducted the Japanese-American
5 negotiations, in mala fide, nefariously, playing for
6 time to prepare for war.

7 "We wanted to keep alive the spark of peace
8 to the last split second. We wanted to clutch at
9 every straw that might make possible the continuance
10 of peace. Surely there was nothing inconsistent between
11 that objective and giving our armed forces and those
12 of our friends time to prepare adequately for self-
13 defense," ⁴⁵⁹ says Mr. Ballantine. Nor for Japan?

14 This Tribunal cannot await the verdict of
15 history, but must now determine whether it were not a
16 travesty upon the truth to say that America was forced
17 into a war with Japan. ⁴⁶⁰

18 THE PRESIDENT: Colonel Warren.

19 MR. WARREN: If the Tribunal please:

20 In presenting the summation of the case for
21 the accused DOHIHARA, it is not the intention of his
22 counsel to either affirm or deny the motivating
23

24 459. Tr. 11,010.

25 460. Note that as early as 27 November Chief of Staff
Marshall was advising Hawaii and other outlying commands
that "if hostilities cannot be avoided the United
States desires that Japan commit the first overt act."
Exhibits 2860-62 (Tr. 25,620-21).

influences brought to bear which ultimately resulted
in any particular incident with which the accused are

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1 generally charged with having perpetrated. We must
2 assume the realistic view that such instances as the
3 Manchurian Incident and the China Incident did occur.
4 While we cannot, and do not concur with the prosecution
5 in their contention concerning the various incidents,
6 their causation and effect, we must recognize that the
7 record is so voluminous that any attempt upon our part
8 to analyze the whole would but obscure the vital prob-
9 lem with which we, as the defense counsel for DOHIHARA,
10 are concerned: That is, what, if any, was the connection
11 our client had with the various incidents to which the
12 prosecution has attempted to connect him? It has been
13 our contention throughout the trial that the position
14 of General DOHIHARA has been highly overrated by the
15 prosecution; that his influence was small and that he
16 was never in a position to direct or control any person
17 who held a position of political strength, sufficient
18 to affect the destinies of Japan. It is true that he
19 did appear on the scene on several occasions but in
20 each instance, as will be shown from our further sum-
21 mation, he appeared as a subordinate officer under the
22 command of his superior officers, with orders to
23 perform a specific mission. In every instance appearing
24 of record this fact will be borne out. No person could
25 listen to the testimony in this case without arriving

1 at the conclusion that the accused DOHIHARA has a great
2 knowledge of the Chinese people, their customs, manners,
3 peculiarities and whims. It was this factor, more than
4 any other one thing, that brought to DOHIHARA the
5 prominence which the prosecution has lavished upon him
6 far beyond its actual importance. Some persons did
7 have plans which they formulated, promulgated, and in
8 many instances carried through to their ultimate con-
9 clusion. Some such plans undoubtedly could result in
10 nothing except good; and some the prosecution has
11 characterized as the machinations of depraved brains,
12 in which characterization incidentally we do not con-
13 cur. When plans are formulated, it is necessary that
14 certain means be provided with which to carry them
15 out; certain instrumentalities are needed for the con-
16 veyance of thoughts, demands and counter demands. When
17 persons, who think up schemes and plan plans, happened
18 to be in the armed forces, it is only natural that
19 they should use as the instrumentality for carrying
20 out their plans those who are subordinate to them. In
21 this last category, DOHIHARA unquestionably fits.
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Any defense counsel, in any case, will learn by bitter experience that the prosecution will distort the meaning of often harmless words so that they appear to have a sinister or hidden meaning. Therefore, anticipating that the prosecution may choose to misinterpret our use of the words "plans" and "schemes" in an attempt to show that we recognize, by their use, a conspiracy, let us now put their minds at ease. The words are used in their ordinary, everyday sense. The idea of a conspiracy between DOHIHARA and any of the accused, such as is alleged by the prosecution, has always appeared more than ridiculous to us and the prosecution has not presented any evidence which would effect our opinion in the least.

The Tribunal can take judicial knowledge that in every army of every nation here represented that one of the cardinal virtues of an army officer is to obey, without question and without hesitation, the orders of his superior officer. Yet, in not one single recorded instance do we find that the accused DOHIHARA ever initiated any action of his own, except incidental to carrying out his assigned mission. Every mission he undertook was upon orders of his superiors, and only after whatever plans there were had already been formulated, and we shall not overlook this fact in

1 supplying to the court proper references to the
2 record. What we recognize as a virtue in our own
3 citizens, we certainly should not condemn as a fault
4 in our enemy.

5 For the purposes of this criminal prosecution,
6 the accused DOHIHARA first appears upon the scene as
7 the head of the Special Service Organization in the
8 City of Mukden. However, the prosecution while admit-
9 ting that this is true, also make vague reference to
10 the many years DOHIHARA had spent in China, but since
11 there is no evidence to that effect of a derogatory
12 nature, it does not even dignify an answer.

13 We have already made reference to the fact
14 that the prosecution often attempts to distort the
15 meaning of words so as to give them a sinister effect
16 not intended. Not only does this hold true of words,
17 but it also holds true of facts. The prosecution
18 attempts to make much of the fact that in a telegram,
19 apparently originating with the Special Service Organi-
20 zation, to which DOHIHARA was attached, there appeared
21 some words to the general effect that the names of
22 DOHIHARA and ITAGAKI was something like the mention of
23 a tiger and that the people turned pale. We have never
24 contended, and never will contend, that there were no
25 newspapers in China and Manchuria that did not dislike

1 General DOHIHARA. We have no doubt that some such
2 papers may have printed similar statements on occasions.
3 Why the prosecution would attempt, by their argument,
4 to have this Tribunal believe that the statement was
5 the statement of the Special Services Organization,
6 a.

7 (Pros. Sum. P. BB-1) given in a bragging manner, is
8 something we cannot understand. It is so far from
9 the truth and the recorded facts that it becomes fan-
10 tastic; in fact, so fantastic that the defense never
11 even attempted to explain it by rebuttal evidence.

12 The document, which the prosecution refers to ^{b.} (Ex.
13 3177-A) was apparently of such little probative value
14 that even the President of the Tribunal questioned

15 its value. ^{c.} (T. 28619). So little value did the
16 defense attach to it, in view of the explanations of
17 the witness AIZAWA, that we did not even press or
18 argue our objection to its introduction. ^{d.} (T.28620).

19 AIZAWA stated in substance, that the document in
20 question was one of the type where various questions
21 were put into political, economic and social categories
22 and that the subject pointed out; i. e., that the people
23 in Southern China, at the mention of the names DOHIHARA
24 and ITAGAKI turned pale, was in his opinion, an item

25 a. Pros. Sum. P. BB-1. c. T. 28619.
b. Ex. 3177-A. d. T. 28620.

1 taken from the newspapers commenting on these two men;
2 that the report so received from the newspapers was
3 recorded in that part of the report. The witness then
4 stated that DOHIHARA's name constantly appeared in
5 newspapers attempting to connect him with conspiracies
6 and plots of various kinds, but that as a matter of
7 fact, during the years he served under General DOHI-
8 HARA, there was not one iota of evidence of his partici-
9 pation in any such movements.^a (T. 28618;28619). There
10 seems little doubt that the origin of the statement was
11 from the newspapers and was not at all what the prose-
12 cution would have the Tribunal believe. As a matter
13 of fact, the whole thing is reminiscent, in some
14 respects, of the remarks of the prosecution some time
15 ago concerning DOHIHARA as being the Lawrence of Man-
16 churia. It just emphasizes again the attempt to con-
17 vict by innuendo rather than evidence. Although the
18 remark was made on more than one occasion, not one
19 single word of evidence was ever introduced to sub-
20 stantiate them. Even so, supposing he had been called
21 the Lawrence of Manchuria, we wonder if there might
22 not have been in prior history another Lawrence whose
23 deeds were of such greater magnitude as to cause a
24 lesser constellation in the firmament of history to
25 a. T. 28618; 28619.

become his namesake? Well, we dismiss the entire thing for what it is worth; a preposterous assumption of facts not substantiated by the evidence as broad as that evidence was permitted to be.

The prosecution state that DOHIHARA had spent eighteen years in China and that his situation there had won recognition of his superiors.^{a.} (Pros. Sum. PP, BB-2). We have already recognized this fact.

Every nation has its specialists in its State Departments and in its armies. The mere fact that a man might be a specialist has absolutely no significance.

DOHIHARA, in his interrogation, admitted the fact, but b.

(T. 15723) while we admit that he did receive recognition from his superiors we should also like to point out that he was considered by them as a man of very mild character, with many friends among the Chinese.

c. (T. 19995). In this connection, it is rather interesting to note that the prosecution also recognize the fact that DOHIHARA was used by his superiors because of his special knowledge and thus bear out the defense's contention.^{d.} (Pros. Sum. PP, BB-2).

The prosecution attempts to make much of the fact of what they term to be an intimate relation between

a. Pros. Sum. PP, BB-2.

b. T. 15723.

c. T. 19995.

d. Pros. Sum. PP, BB-2.

1 the accused DOHIHARA and one OKAWA, who was adjudged
2 by this Tribunal to be an incompetent. They contend
3 that DOHIHARA was deeply involved in drafting a plan
4 to set up a cabinet centering around the army with a
5 more positive policy towards Manchuria and cite for
6 their authority the testimony of OKAWA contained in
7 a. (exhibit 2177-A), the minutes of the third trial of
8 OKAWA held in the Tokyo Court of Appeals. It is
9 singular that in their summation the prosecution admits
10 that DOHIHARA was at the time at an outpost in China
11 and that he was kept busy there. b. (Pros. Sum. PP, BB-
12 2,3). There can be no question about this statement
13 because although the prosecution does not say so, a
14 scrutiny of the record will show that the incident
15 referred to occurred after the Manchurian Incident,
16 which took place on September 18, 1931, and the two
17 were supposed to have been connected in some vague
18 manner. The incident finally became known as the
19 October Incident. c. (T. 15585). General DOHIHARA was
20 at that time the Mayor of Mukden. d. (Ex. 57, Lytton
21 Report, P. 88). What the prosecution failed to point
22 out was that at the time OKAWA gave the testimony in
23 question, he was on trial for his own actions and was
24

25 a. Ex. 2177-A.

b. Pros. Sum. PP, BB-2,3.

c. T. 15585.

d. Ex. 57, Lytton Report,
P. 88.

attempting to vindicate himself.

1 They likewise neglected to remind the
2 Tribunal of the manner in which the testimony concern-
3 ing DOHIHARA was gotten from OKAWA. The prosecution,
4 having failed to do so, it behooves us to analyze it.
5 Prior to the incident complained of, neither the army
6 nor the cabinet had a definite policy,^{a.} (T. 15585),
7 and the idea of the promulgation of the so-called
8 October Incident had to be formulated in a short
9 period of time.
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11 We shall not discuss it here, but the members
12 of the Tribunal can verify our remarks by reading the
13 record,^{b.} (T. 15585-15586). OKAWA himself knew little
14 about the plan or who was involved and at the best
15 everything he had to say about it was little better
16 than a guess on his part. At the time the controversial
17 testimony was given by OKAWA, he was being examined by
18 the Chief Justice of the Court and^{c.} (T. 15577), when
19 asked by the Chief Justice who it was who drafted the
20 ultimate plan, the witness answered that he did not
21 know. He was then asked if he did not know who was at
22 the top of drafting the plan. He stated that he had
23 an idea. At this point the Chief Justice then asked
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25 a. T. 15585.

b. T. 15585-15586.

c. T. 15577.

1 the question which the prosecution insists involved
2 the accused DOHIHARA. That question was, "Are SHIGETO,
3 HASHIMOTO, ITAGAKI, and DOHIHARA involved?" and the
4 witness answered, "Yes." In answer to the next ques-
5 tion by the Chief Justice, he stated that he was the
6 only civilian involved. The Chief Justice then made
7 this observation, referring to DOHIHARA and the others
8 mentioned in the previous question: "After all, they
9 are satisfied with how things are now so what do they
10 want to do?" The witness started his next answer with
11 the words: "Their plan, I suppose" ^a (T15587).

12 We invite the Tribunal to again peruse this
13 portion of the record in order to refresh its memory
14 because the record clearly demonstrates what the Chief
15 Justice of the Court had in mind and any person
16 familiar with cross-examination of a witness could
17 never be long in doubt. First he wanted to know
18 exactly how much the witness knew about the things of
19 which he was testifying. That he was satisfied in his
20 own mind the witness knew very little and was only at-
21 tempting to help himself is amply demonstrated by the
22 observation he made that DOHIHARA and the other persons
23 mentioned were satisfied with things. He was only
24 permitting the witness to further ensnare himself in
25 a. T. 15587.

1 his own entangled web of half truths and untruths.
2 How the Chief Justice knew that DOHIHARA and the other
3 men mentioned were satisfied with the way things were
4 is now shown, but if the record demonstrates any one
5 thing clearly, it demonstrates that the Chief Justice
6 knew they were satisfied and this fact alone should
7 prove that DOHIHARA had nothing to do with the so-
8 called October Incident, and in addition, he was, as
9 the prosecution posed it, busy at the outposts in
10 China. The prosecution next state that DOHIHARA was
11 appointed Chief of the Special Services Organization
12 of the Kwantung Army ostensibly for the purpose of
13 investigating the case of Captain NAKAMURA but as they
14 blandly put it, his real mission, as disclosed in his
15 interrogation was to investigate and determine the
16 strength of the Chinese forces, their training, their
17 communications and conditions of the civilian popula-
18 tion.^{a.} (Pros. Sum. PP. BB-3).

20 They give us their authority for this state-
21 ment references to the interrogation of DOHIHARA. Again
22 there is no analyzation of the testimony. In the first
23 place DOHIHARA was never the head of the Special
24 Services Organization of the Kwantung Army nor did he,
25 as they accuse him of doing, state what they said he

a. Pros. Sum. PP. BB-3.

1 did. It is well to remember that when DOHIHARA was
2 interrogated he was without the benefit of counsel and
3 was required to answer and from the way the interroga-
4 tions were put to him one receives a compelling im-
5 pression that they were put by some person whose own
6 opinion of himself far exceeded his actual ability.
7 That person, throughout the interrogation, never
8 failed to take advantage of his position and always
9 insisted on attempting to put into the mouth of DOHI-
10 HARA things he did not say or mean.

11 The occasion of which we now speak is but a
12 practical demonstration of that fact. The question
13 put to him was as to whether he still insisted that his
14 story, that his only mission was to investigate the case
15 of Captain NAKAMURA, was true. There was no evasion
16 whatsoever by DOHIHARA in answering this snide type of
17 questioning. He stated that it was not his only pur-
18 pose but that it was his most important. In the next
19 question the interrogator flatly contradicts him and
20 states he had been told on a previous occasion by
21 General DOHIHARA that such was his only purpose. How-
22 ever, DOHIHARA answered that he thought he had merely
23 told him it was his most important job, but that as
24 head of the Special Services Organization he had other
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1 duties which he outlined.^{a.} (T. 15724, 15725). The
2 prosecution's statement that DOHIHARA's primary busi-
3 ness in Manchuria at that time was for the purpose of
4 investigating and determining the strength of the
5 Chinese forces, their training, etc., is nothing but
6 an attempt to convince the Tribunal of their manner of
7 thinking, and is contrary to the record and is just
8 another attempt to get the Tribunal to believe that
9 the accused DOHIHARA was attempting to evade questions
10 put to him on his interrogation, a fact which we flatly
11 deny.

12 To prove that his primary mission was that of
13 investigating the NAKAMURA case, we could quote many
14 portions of the record. However, since the Lytton
15 Report^{b.} (Ex. 57, p. 63) includes an entire chapter
16 on the NAKAMURA case, because of its importance to the
17 relationship between China and Japan, we ask the
18 Tribunal, if there be any doubt in their minds, to
19 read that chapter. The prosecution's beautiful
20 theory falls of its own weight.

22 It is apparent that the prosecution know
23 the weakness of their argument as to the purpose of
24 DOHIHARA's appointment as the head of the Special

25 a. T. 15724, 15725.

b. Ex. 57, p. 63.

1 Services Organization at Mukden because in the very
2 next paragraph of their argument^{a.} (Pros. Sum. PP.
3 BB-4), they charge DOHIHARA with attempting to foul
4 up the NAKAMURA case so that no agreement could be
5 reached. Nothing could be further from the truth,
6 but it demonstrates the attitude of the prosecution
7 to studiously attempt to enrich by their own imagina-
8 tion the facts with fiction.
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1 This fact is shown in their summation on
 2 this point because again they circumvent the true
 3 facts. They state in substance that every effort was
 4 being made on the part of the Chinese to meet the
 5 wishes of the Japanese with reference to the NAKAMURA
 6 Case^{a.} (Prosecution summation PP BB-3 Par BB-6) and
 7 that although it was believed by the Japanese Consular
 8 authorities that a solution was near, it was DOHIHARA
 9 who continued to question the sincerity of the Chinese
 10 in an effort to arrive at a satisfactory solution.^{b.}
 11 (Prosecution Summation PP BB-4 Par BB-6). Well, again,
 12 they cannot have read the Record very clearly. The
 13 Lytton Commission never did say that the Chinese were
 14 doing everything they could to settle the NAKAMURA Case.
 15 To use the exact words of the Lytton Report, "...it would
 16 seem that diplomatic negotiations for attaining a
 17 solution of the NAKAMURA Case were actually progressing
 18 favorably up to the night of September 18."^{c.} (Exhibit
 19 57, p. 65, Par. 3). It appears, from a further study
 20 of the Lytton Report that if the Chinese were trying
 21 to settle the question so were the Japanese because
 22 it specifically states that the Japanese Consular authorities
 23 felt that an amicable solution was near. While the
 24

25 a. Pros. Sum PP BB-6
 b. Pros. Sum. PPBB-4 Par BB-6
 c. Exhibit 57, p. 65, Par. 3

1 Report does point out that some officers, especially
2 DOHIHARA, continued to question the sincerity of the
3 Chinese this cannot be construed to mean that these
4 same officers were not attempting to effect a
5 satisfactory solution. In the same paragraph, where
6 that statement appears, we find this statement,
7 "Consul General HAYASHI, Mukden, was reported on
8 September 12th, 13th, to have reported to the Japanese
9 Foreign Office that an amicable solution would probably
10 be made on the return of the investigators to Mukden."

11 This statement by Consul General HAYASHI was
12 based upon the admission of General Yung-Chen who had
13 finally admitted that Chinese soldiers were responsible
14 for the death of Captain NAKAMURA.^{a.} (Ex. 57, Lytton
15 Report, P. 65, Par. 3). Without quoting the Record,
16 because the point is not controversial we know that
17 General DOHIHARA was one of the agents referred to and
18 that he had been called to Tokyo to report on the
19 progress of the NAKAMURA Case and on September 18th
20 was on his return to Mukden.

21 It is interesting to note that in a conference
22 on the 18th of September, the Chinese for the first
23 time formally admitted their responsibility for the
24 death of Captain NAKAMURA. It is true that unofficially
25

a. Ex. 57, Lytton Report, p. 65, Par. 3

General Yung-Chen had stated that the Chinese were responsible, but the earliest date given anywhere in the record that even unofficially an admission had been made was on the 12th of September. Be that as it may, it does not change the picture one iota. In view of a correct analyzation of the testimony which we feel we have given and which we invite the Tribunal to test by a study of the record, it does not appear that the Chinese had done one single thing up until that time to indicate their sincerity with reference to a settlement of the case and if the Japanese doubted Chinese sincerity they undoubtedly had a perfect right to do so. (Lytton Report, Ex. 57, P. 65). We again refer the Tribunal to the contention of the prosecution that DOHIHARA's primary mission in China was, at that time, not the NAKAMURA Case and now ask whether that contention is sound.

The prosecution seems to think it of prime importance that the defense witness SHIBAYAMA thought that Chang-Hsueh-Liang was sincere in his efforts to settle the NAKAMURA Case. We can see no importance whatsoever in this fact. SHIBAYAMA was advisor to Chang at the time and it would be only natural that Chang would attempt to convince him that such was so. However, that

a. Lytton Report, Ex. 57, p. 65.

Does not mean that the Chinese actually were sincere.
 The prosecution state that ITAGAKI and other staff
 officers of the Kwantung Army were using the NAKAMURA
 Case as a pretext to start military actions in Manchuria
 and cite the Lytton Report. This claim is wrong.
 What the record actually states is that the Chinese
 claimed that the Japanese used the NAKAMURA Case as
 a pretext for the occupation of Manchuria and that
 they (the Chinese) denied the contention of the Japanese
 that there was insincerity or delay on the part of the
 Chinese officials in dealing with the Case: ^{a.} (Lytton
 Report, Ex. 57, p. 65, last par.) The Chinese made
 that statement in spite of the fact that they had
 already appointed one commission which did nothing
 and then, because of pressure, appointed a second
 commission. ^{b.} (Lytton Report, Ex. 57, p. 65, 2nd par.).
 The mere fact that the Chinese claimed that the Japanese
 were using this as a pretext does not make it so then
 or now. Without citing the record we ask the Tribunal
 to recall to mind the fact that there were over 300
 unsettled claims at that time and the NAKAMURA Case
 was but "the straw that broke the camel's back."

Since the prosecution attach great weight to the

- ^{a.} Lytton Report, Ex. 57, p. 65, last par.
^{b.} Lytton Report, Ex. 57, 2nd par.

1 fact that KOHIHARA is supposed to have made statements
2 in the press advocating the settlement of all pending
3 issues, if necessary by force, and inasmuch as that
4 statement by the prosecution is somewhat substantiated
5 by the Lytton Report^{a.} (Ex. 57, p. 66), we feel it
6 necessary to discuss it briefly.

7 It must be borne in mind that the Japanese
8 public was highly aroused, not only by the NAKAMURA
9 Case, but the some three hundred other incidents, and
10 the Lytton Commission by no means attempted to lay
11 all the blame on the Japanese, but stated candidly that
12 each side accused the other of having violated,
13 unilaterally interpreted, or ignored the stipulations
14 of the Sino-Japanese agreements. They also recognized
15 that the three hundred so-called cases were situations
16 arising out of broader issues, which were rooted
17 fundamentally in irreconcilable policies, and "Each
18 side had legitimate grievances against the other."^{b.}
19 (Ex. 57, PP. 66).

20 The report goes on to relate that there
21 was effort to settle these questions through normal
22 procedure of diplomatic negotiations and peaceful
23 means, and that those means had not been exhausted, but

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25 a. Ex. 57, p. 66
b. Ex. 57, PP. 66

1 that long delays had put a severe strain on the patience
2 of the Japanese.^a (Ex. 57, P.66). In this connection
3 it is interesting to note that the Lytton Commission
4 states that DOHIHARA was quoted by the press as the
5 advocate of the solution of all pending issues and
6 does not confine his statements to the NAKAMURA Case.
7 We do not know what the newspaper stories actually
8 contained, or in what manner they quoted him, but
9 certainly if he did make such statements to the press,
10 he was not alone in his belief that the disputes
11 would have to be settled.

12 In order to fully appreciate the mental
13 outlook of DOHIHARA at that time it is necessary to
14 consider the then situation in China with reference to
15 local armies, civil war, banditry and the attitude and
16 power of the Central Government. We submit without
17 further comment the following extracts from the Lytton
18 Report.

19 "Its armed forces are also identified with
20 their commander, not with the nation. The transfer
21 of a commander from one army to another by order of
22 the Central Government is, in many cases impossible.
23 The danger of civil war must continue to exist so long
24 as the Central Government lacks the material means to
25 a. Ex. 57, P. 66

1 make its authority swiftly and permanently felt all
2 over the country."

3 "The problem of banditry which may be traced
4 throughout the history of China, and which exists
5 today in all parts of the country, is subject to the
6 same considerations. Banditry has always existed
7 in China and the administration has never been able to
8 suppress it thoroughly." (Ex. 57, p. 19, last six
9 lines of para. 2, and the first 4 lines of para. 3.)

10 ...in addition to the natural desire to
11 be free from any outside control in a people that has
12 become conscious of national unity, the influence of
13 the Kuomintang has introduced into the nationalism of
14 China an additional and abnormal tinge of bitterness
15 against all foreign influences, and has expanded its
16 aims so as to include the liberation of all Asiatic
17 people still subject to 'imperialistic oppressions'."
18 (Ex. 57, p. 18, para. 2) "The reluctance of China to
19 receive foreigners and her attitude toward those who
20 were in the country was bound to have serious conse-
21 quences..." "the inevitable conflict of two
22 irreconcilable conceptions of respective rights and
23 international relations led to wars and disputes..."
24 (Ex. 57, p. 14, para. 4 & 5) "The recrudescence of
25 civil war favored the growth of Communist influence in

the period between 1928-31...." "The Communist forces
1 had operated in parts of Kiangsi and Hunan Provinces,
2 and were then reported to have caused in two or three
3 months the loss of 200,000 lives and of property valued
4 at about one billion dollars (silver)." (Ex. 53, p. 21,
5 para. 4).
6

7 We submit that DOHIHARA's statement, under
8 the circumstances, is one that could reasonably be
9 expected from a military man and the Tribunal can
10 take judicial knowledge of the attitude of present
11 military leaders.

12 The prosecution admit that DOHIHARA was not
13 in Mukden at the time the Mukden Incident broke out
14 but they hint that regardless of the evidence, he still
15 was a responsible party; that even though DOHIHARA
16 himself was not present, his office was the center of
17 invasion operations, and that his office served as an
18 indispensable link in the chain of communications
19 between the outposts and headquarters of the Kwantung
20 Army, and was in exclusive possession of a special
21 code by which communications to the Commander-in-Chief
22 were to be made.^{a.} (Pros. Sum P. BB-5)
23

24 Part of this contention is true, but the
25 prosecution did not attempt to analyze the testimony
a. Pros. Sum. P. BB-5).

1 or they undoubtedly would not have made the statement
2 they did. The reason the office of the Special Service
3 organ was used as headquarters for the Kwantung Army
4 that night was purely coincidental. ITAGAKI, on
5 that evening, had been to visit with General TATEKAWA,
6 and was returning to his billet. As it was too early
7 to retire, he decided to visit the office of the
8 Special Service organ.^{b.} (T. 30,351-352). As he
9 was on the point of leaving, he received a telephone
10 call reporting the outbreak of the incident, which
11 prevented him from returning to his billet. He being
12 the responsible officer, it would have made no difference
13 where he had been; that place would have become, for
14 all intents and purposes, the headquarters. That fact
15 that he later approved the plans of SHIMAMOTO and HIRATA
16 while in the office of the Mukden Special organ is of
17 no importance. The assertion that the Special Service
18 organization had a special code by which communication
19 with the Commander-in-Chief was to be made is not borne
20 out by the record. ITAGAKI, as a witness, did state
21 in substance that this Special Service organ had a
22 telegraph or code telegram form, and as not everybody
23 had this form, if there was any need to send a coded
24 military telegram, it was necessary to call this Special
25 ^{b.} T. 30,351-352.

Service Organ. But, in this connection he further
1 states that whenever any negotiations relating to
2 military matters had to be conducted, the important
3 matters were relayed to the Consulate General and
4 only the less important or minor matters were dealt
5 with directly by this Special Service Organ.^{a.} (T. 30,353).
6 There is absolutely no evidence to connect DOHIHARA
7 in any manner with any scheme to bring about the Mukden
8 Incident and the prosecution know it. Their statement
9 to the effect that MORISHIMA's testimony that DOHIHARA
10 had no connection with the incident merely dispels
11 the assumption that as one of the original schemers
12 DOHIHARA was not likely to have taken part personally
13 in the activities of September 18th,^{b.} (Pros. Sum. PP.
14 BB-5) is but wishful thinking and has no foundation
15 in the evidence.
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25 a. T. 30,353

b. Pros. Sum. PP. BB-5.

1 The remarks of the prosecution concerning
2 DOHIHARA's activities as Mayor of Mukden are hardly
3 worthy of answer. They again refer to the Lytton
4 Report to show that upon him taking over the post of
5 Mayor of Mukden, a Special Emergency Committee was formed,
6 with the majority of the members being Japanese. This
7 we do not deny, but this was necessary because most of the
8 prominent officials and leading members of educational
9 and commercial communities who could afford to do so
10 left immediately. The police and even the prison wardens
11 disappeared, and municipal, district and provincial ad-
12 ministrations completely broke down; public utility
13 companies, the busses, the tramways, the telephones, and
14 telegraph services ceased to function; banks and shops
15 kept their doors closed,^{a.} (Ex. 57, p. 88). Had
16 DOHIHARA wanted Chinese to assist him, he would have
17 hardly been able to obtain them. However, within three
18 days, DOHIHARA, by his administration of the city, had
19 it functioning normally; civil administration was re-
20 stored; several hundred police and most of the prison
21 wardens were brought back and public services were re-
22 stored.
23

24 The prosecution has consistently asserted that
25 the Chinese people despised and hated DOHIHARA, yet here
(a. Ex. 57, p. 88.)

1 we have the uncontroverted proof that persons, who had
2 fled apparent danger, returned within three days. It
3 can only be assumed that those who fled did so because of
4 the Japanese. By no stretch of the imagination can it
5 possibly be believed that those persons would return from
6 comparative safety, which they must have reached, unless
7 they had faith in the person who took over the admini-
8 stration of their city. The thing the prosecution fails
9 to mention is that the Lytton Commission states as a
10 positive fact that "on October 20th, the reins of the
11 municipal government were restored to a qualified
12 Chinese body. . ."^{a.} Although the prosecution states
13 that the assumption of the mayoralty of Mukden by
14 DOHIHARA is significant because it was the first time an
15 officer in the Japanese service took over the admini-
16 stration of a city in China, to have failed to do so
17 would have been far more significant. "The immediate
18 necessity was the organization of a municipal government
19 and the restoration of the ordinary civic life of the
20 city."^{b.} It was not a question of significance or any-
21 thing of the kind. It was a question of absolute neces-
22 sity.

23
24 Why then was DOHIHARA selected? The reasons
25 should be and are obvious; no person would have dared

(a. Ex. 57, p. 88.

b. Ex. 57, p. 88.)

undertake the reorganization of the completely disrupted city of Mukden, with any hope of success, unless that person was known and liked by the citizens. In addition to this vital qualification which would, of necessity, have to be present in a person undertaking that responsibility, it also required a person who had deep knowledge of the manners, customs and language of the Chinese. Under the circumstances it was only natural that DOHIHARA would be chosen as the most likely person to succeed in a reasonably short period of time.

That he was able to do so is amply shown and the record is a testimonial to his success.

THE PRESIDENT: We will recess for fifteen minutes.

(Whereupon, at 1445, a recess was taken until 1500, after which the proceedings were resumed as follows:)

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1 The witness KATAKURA, Tadashi state in sub-
2 stance that Colonel DOHIHARA was appointed the Mayor of
3 the city temporarily on the condition he would serve
4 until a competent person could fill that position.
5 The accused MINAMI, upon being cross-examined by the
6 prosecution relative to the fact that DOHIHARA was
7 appointed the Mayor of Mukden contrary to his orders,
8 stated in substance that although the Cabinet had de-
9 cided no military administration was to be established
10 and that such decision was communicated to Commander
11 HONJO of the Kwantung Army, he did not believe that
12 the appointment of DOHIHARA as Mayor of Mukden was a
13 violation of the order. On the contrary, in light of
14 the situation and because of the acute state of disorder
15 prevailing in that major city, it was, as a matter of
16 fact, unavoidable.^a

17 In reviewing the testimony of both General
18 MINAMI and the witness KATAKURA there is no question
19 but that the appointment of DOHIHARA as Mayor of Mukden
20 was for a short period of time and was not intended as
21 the establishment of a military regime. As a matter of
22 fact, the testimony throughout reflects that DOHIHARA
23 had no military assistance whatsoever.

24 We again assert that it is preposterous to
25

a. T. 18,926-18,927.

a. T. 19,879-80

1 believe that any person could reach the conclusion that
2 the Chinese, police officers and prison warders in-
3 cluded, would flee from the wrath of the Japanese and
4 reach comparative safety, and then return in a period
5 of three days to the very seat of the recently fled
6 danger unless they had implicit and absolute confidence
7 in the man the enemy had selected to restore order and
8 peace. This fact standing alone should be sufficient
9 to convince any court of justice beyond a reasonable
10 doubt that DOHIHARA was not universally hated and
11 distrusted by the Chinese people as the prosecution
12 would have you believe. That the members of the Lytton
13 Commission did not believe this to be true is reflected
14 in their high praise of his activities. That Lord Lytton
15 personally had great respect and admiration for General
16 DOHIHARA can hardly be denied. In the interview of
17 record which he and members of the Commission had on
18 May 3, 1932 in Changchun, Lord Lytton stated:

19 "We would like to follow the story out. We
20 understand the General took over the civil administra-
21 tion at Mukden immediately after the events of September
22 18. Would he please describe conditions at that time,
23 state what steps he took, etc. ...?"
24

25 a. Ex. 3180, Ex. 3180-A, P. 2; T. 28,667-28,669.

1 At that point General DOHIHARA explained what
2 had been done and his contribution thereto and as soon
3 as he had completed his response to the question posed
4 by Lord Lytton, Lord Lytton then continued:

5 "I expect the General is much too modest in
6 regard to his activities, for I understand that at the
7 end of a month everything was brought back to peaceful
8 conditions and he felt he could then hand matters over
9 to some one else." ^b

10 In reading the Lytton Report and other docu-
11 ments pertaining thereto, one does not receive the
12 impression that Lord Lytton was given to flattery for
13 the sake of flattery alone. On the contrary, it would
14 appear that he was a sincere man, honest in his endeavor
15 to carry out the high commission which had been foisted
16 upon him and did not need to use flattery to assist him
17 to that end. Even if it were possible to arrive at
18 the conclusion that his words were idle, there are
19 other facts which we can now view in retrospect and
20 which are startling in their implications as to the
21 feeling held by the Commission towards DOHIHARA. The
22 Commission, in its report, with reference to statements
23 made by General DOHIHARA, would almost without excep-
24
25 b. Ex. 3180, Ex. 3180-A, p. 4.

1 tion either adopt his views or give them great considera-
2 tion. For instance, with reference to the NAKAMURA
3 Incident, the Report states:^a

4 "Numerous statements of Japanese military
5 officers, however, especially those of Colonel K.
6 DOHIHARA continued to question the sincerity of the
7 Chinese ..."

8 Later the Commission set out certain con-
9 clusions which it had reached, and one of them was:^b

10 "As a corollary to the above, it is necessary
11 that provision should be made for facilitating the
12 prompt settlement of minor disputes as they arise."

13 "Unquestionably in this instance the commis-
14 sion recognized the sincerity of his feeling in believ-
15 ing that the Chinese were not sincere and there seems
16 to be every reason to suspect that General DOHIHARA's
17 opinion concerning the Chinese attitude at that time
18 was absolutely correct.

19 Throughout the entire Lytton Commission Report
20 there is no derogatory remark made concerning DOHIHARA.
21 On the contrary, the Commission appears to have gone
22 further than was necessary in specifically mentioning
23 his activities in a favorable light. The fact that he
24 was mentioned on more than one occasion only tends to
25

a. Lytton Report, Ex. 57, p. 65.

b. Lytton Report Ex. 57, p. 130

1 show that great weight was given his opinion. As can be
2 seen by reading the whole of the Report, the Commission
3 bears out, by the recitation of facts and in very favor-
4 able terms, the testimony of defense witnesses that
5 whenever General DOHIHARA's troops entered an area,
6 business continued as usual and that the Chinese people
7 trusted and cooperated with him to the fullest extent.^a

8 The prosecution, as was expected, has attempt-
9 ed to show that General DOHIHARA instigated, initiated,
10 and carried through a plan for the kidnapping of Henry
11 Pu-Yi, and rely almost entirely on a series of tele-
12 grams originating with one KUVAJIMA, Kazue. Although
13 KUVAJIMA was available to the prosecution and resided
14 in the city of Tokyo, they did not produce him before
15 the Tribunal for reasons which will become more obvious
16 as we proceed with our summation.

17 However, we should like at this time to re-
18 call to the mind of the Tribunal that there came a
19 time in the presentation of the defense case when,
20 because of mechanical difficulties, we were forced to
21 request a continuance in order to avoid a breakdown
22 which was then imminent. Mention is made of this fact
23 because we wish to remind the Tribunal that, as the trial
24 a. T. 28,680; 28,694; 28,707
25

1 progressed the Tribunal realized that if it continued
2 to accept evidence of certain types the trial could
3 drag on for years. As the Tribunal knows, the defense
4 had processed, or were processing, evidence of the type
5 which the Court had in mind, among which were numerous
6 newspaper and periodical reports. We had spent con-
7 siderable time and effort and did discard, in defer-
8 ence to the wishes of the Tribunal, practically all of
9 our evidence of that type. We assumed then, and now
10 assume, that the Tribunal was not interested in news-
11 paper reports as evidence. But since much evidence,
12 based on newspaper reports, rumor, and hearsay was in-
13 troduced by the prosecution and still remains in evi-
14 dence, we feel it necessary to discuss them and point
15 out what we consider to be fatal defects. When this
16 has been done we ask the Court to completely disregard
17 them as having no evidentiary and certainly no proba-
18 tive value.
19

20 As the Tribunal will recall, on the 28th of
21 August 1946, a number of telegrams were introduced by
22 the prosecution dealing with the accused DOHIHARA and
23 his alleged kidnapping of the Emperor Pu-Yi himself.
24 In passing, it is noteworthy that the prosecution,
25 although Pu-Yi was their witness, failed utterly to
mention his testimony in regard to the activities of

1 DOHIHARA with reference to his alleged abduction. The
2 truth is, of course, they did not dare to do so be-
3 cause his testimony causes their carefully planned house
4 of cards to tumble to the ground.

5 It is hard to conceive, after having heard
6 the testimony of Pu-Yi, and having been able to evaluate
7 and observe his actions and demeanor on the witness
8 stand, that any person could draw a conclusion from the
9 evidence that he was kidnapped, or for that matter,
10 that undue persuasion was used upon him. However, we
11 cannot assume that the Tribunal will accept our viewpoint
12 and consequently we have no choice except to analyze
13 his testimony on that score.

14 No person should know better whether the
15 accused DOHIHARA kidnapped him than the person who was
16 supposed to have been kidnapped. While this counsel
17 has no confidence in the truth or veracity of Pu-Yi, he
18 was nonetheless a witness for the prosecution and they
19 are bound by his testimony. But regardless of our
20 candidly expressed opinion of his testimony, there
21 could be no reason whatsoever for him to tell an un-
22 truth concerning the activities of DOHIHARA; yet in
23 his testimony he mentions DOHIHARA only a few times.
24 Despite the fact that the telegrams just mentioned
25 repeatedly referred to DOHIHARA as having conversa-

1 tions with Pu-Yi and attempting to kidnap him, such
2 conversation, if there was more than one, apparently
3 did not register with Pu-Yi. We have already discussed
4 the activities of DOHIHARA while he was the Mayor of
5 Mukden and therefore know that he could not have spent
6 any considerable time in Tientsin even had he wanted
7 to, because the very physical nature of the job he was
8 required to do in Mukden precluded any such possibility.
9 To have carried out all the manifold operations which
10 the prosecution has attempted to prove he engineered .
11 during the time he was Mayor of Mukden would have been
12 impossible and even the prosecution does not claim that
13 he is "Superman"! That DOHIHARA went to Tientsin and
14 talked with Pu-Yi we do not deny. However, so little
15 did Pu-Yi think of DOHIHARA's visit to him that he
16 never mentioned it in his testimony although he was
17 given ample opportunity to do so if he had remembered
18 it. Pu-Yi was asked this direct question concerning
19 the period of time DOHIHARA was in Tientsin and specifi-
20 cally around the time when the September 18 Incident
21 broke out:

22 "Q Did you receive a visit from any promi-
23 nent official about that time?
24

25 "A That time the Japanese Commander of the
Japanese garrison forces in Tientsin, by the name of

KASHII, came to see me." ^a

1 Pu-Yi then relates the conversation he had
2 with KASHII, and when later asked by the prosecution
3 whether he went to Port Arthur, and what happened, he
4 stated that he went under the compulsion of General
5 KASHII, that he was compelled by KASHII to go to Port
6 Arthur. ^b

7 DOHIMARA, in his interrogation, which is in
8 evidence, admits that he did have a meeting with Henry
9 Pu-Yi in Tientsin in October 1931 when he was the
10 Mayor of Mukden. He states that he went there for
11 the specific purpose of contacting Pu-Yi; that he was
12 sent by the Kwantung Army under orders; that General
13 HONJO was the Commander of the Kwantung Army and that
14 General ITAGAKI, then Colonel ITAGAKI, was Chief of the
15 Second Section of the General Staff; that his orders
16 to proceed to Tientsin were issued by General HONJO,
17 but the detail of his meeting with Pu-Yi was arranged
18 by Colonel ITAGAKI, and that, in substance, his instruc-
19 tion was to convey to Pu-Yi that should he, Pu-Yi, re-
20 turn to Manchuria the Kwantung Army would welcome his
21 return. When asked if he was to suggest to Pu-Yi that
22 the reason the Kwantung Army would welcome him back
23

24
25 a. Tr. p. 3955
 b. Tr. 3956

1 was because they would like to have him head the new
2 government, DOHIHARA stated that he believed the Kwan-
3 tung Army must have had that idea; however, he himself
4 had no such idea. He admitted that perhaps Pu-Yi,
5 upon receipt of the message, which he was ordered to
6 deliver, might conceive that idea. He also stated
7 that the plan was not his but that upon receipt of
8 instructions from the Kwantung Army he felt perhaps
9 such things would be required to settle the Manchoukuo
10 turmoil. As for himself, he thought more about the
11 many factions competing against each other and other
12 disturbances than he did of what the Chief of the
13 Second Section, that is, ITAGAKI, had told him at
14 that time. He also stated that he was warned not to
15 force Pu-Yi to return to Manchoukuo, that if Pu-Yi
16 wanted to come that would be fine, but that he was
17 definitely told it would not be necessary to bring him
18 back forcibly, because, although he did not know, per-
19 haps the Chief of the Second Section might have had some
20 other idea to control the situation in Manchuria, even
21 though Pu-Yi did not return.^a The analyzation of the
22 interrogations taken from the accused DOHIHARA and in-
23 troduced in evidence by the prosecution is interesting.
24

25 It reflects the feeling the prosecution had

a. Tr. p. 15,726, 15,727, 15,728

1 when they were given a free reign to question the
2 accused without benefit of counsel. They felt then,
3 and unquestionably feel now, that DOHIHARA never kid-
4 napped Pu-Yi and never went on any such mission. How
5 do we know this? The prosecution would have questioned
6 him on that score and brought his answer and laid it
7 before the Tribunal. This they did not do, and this
8 one single act of omission stands as an indictment of
9 their sincerity.

10 In cross-examination Pu-Yi does specifically
11 mention the accused DOHIHARA. He states that he re-
12 ceived a fruit basket in which there was a bomb bear-
13 ing a Chinese name card, and that "There was reason
14 for the inference that the fruit basket incident was
15 instigated by DOHIHARA." He goes on to say, "Of course
16 what I heard can be only considered as hearsay."^a
17 So we have this strange paradox in the prosecution
18 argument: DOHIHARA was sent to Tientsin for the pur-
19 pose of conveying a message urging the return of Pu-Yi
20 to Manchuria to act as Emperor and to kidnap him if
21 necessary, and Pu-Yi not even remembering the incident
22 sufficiently to give testimony on it but asserting, on
23 the contrary, that it was his belief that DOHIHARA
24 attempted to assassinate him by sending him a bomb in a
25 a. Tr. p. 4124

1 basket of fruit. What are we going to believe; did
2 DOHIHARA go to Tientsin for the purpose of kidnapping
3 Pu-Yi or for the purpose of killing him? To assert
4 that a fruit basket was sent to Pu-Yi for the purpose
5 of frightening Pu-Yi into doing what Pu-Yi already
6 wanted to do, in the face of the testimony before this
7 Tribunal and in the face of Pu-Yi's testimony, is utter-
8 ly ridiculous. However, it is interesting to note that
9 none of the testimony on the part of the prosecution
10 or the defense either directly or by inference ever
11 connected the accused DOHIHARA with Pu-Yi after the
12 alleged kidnapping. As a matter of fact, Pu-Yi states
13 that all of his dealings after this alleged kidnapping
14 by General KASHII, was with the then Colonel ITAGAKI.
15 It is further interesting to note that, in his examina-
16 tion concerning his trip from Tientsin to Port Arthur,
17 Pu-Yi never one single time mentioned the name of
18 DOHIHARA, although other prosecution evidence does.
19 However, this question is moot, because the prosecution
20 admits in their argument that DOHIHARA did not accom-
21 pany Pu-Yi.^a

22 At this time we will return to the discussion
23 of the telegrams previously mentioned. The true type
24 of evidence they actually portray will be revealed
25 a. Pros. summation BB-20.

1 upon analyzation of the text of the telegrams them-
2 selves.

3 The first that we will discuss is exhibit
4 ^b300. The prosecution base much of their argument on
5 this telegram and quote portions of it, but not all of
6 it. Part of that which they do quote is wrong.
7 ^cThe original translation of the telegram, as introduced,
8 was changed by the Language Arbitration Board when the
9 prosecution attempted to impeach the witness KUWAJIMA
10 upon it.

11 As will be pointed out, the witness stated
12 in his affidavit that he had talked with DOHIHARA on
13 two occasions, whereas the telegram as originally
14 translated stated that he had deliberately talked with
15 him on several occasions. The word "several" was
16 changed to the word "two,"^a and although the prosecution
17 in their argument adopted all changes except one by
18 the Language Arbitration Board, that one which they
19 did not adopt was the changing of the word "several."
20 The failure to make this one change would of course
21 lead one to believe that their attempted impeachment
22 of the witness was successful and unless the reference
23 just cited was brought to the attention of the Tribunal,
24 a wholly erroneous idea could be obtained. Why the
25

b. Tr. 4395-6

a. Tr. 28,666

c. Pres. sum. p. BB-12

1 prosecution failed to substitute this one word we do
2 not know, but assume that it was an error. However,
3 it does have a direct bearing upon the prosecution's
4 argument with reference to the testimony of KUTAJIMA.

5 The prosecution have assumed the position
6 that the telegram contains a recitation of facts
7 because there appears in the telegram a statement to
8 the effect that a secret investigation revealed certain
9 things. This cannot be accepted, because the witness
10 KUTAJIMA, who sent the telegram, stated in his affi-
11 davit that in order to understand the then existing
12 situation, it was necessary to realize that there was
13 friction between the Foreign Office and the Kwantung
14 Army and that the army was acting independently of the
15 Foreign Ministry and consequently he, KUTAJIMA, received
16 no official information from the army as to the activi-
17 ties of any of its members and had no means by which
18 he could do so. He further stated that he was far too
19 busy to conduct any personal investigation of the
20 actions of DOHIHARA and had to depend upon his subord-
21 inates to collect whatever information they could get
22 and from whatever sources available. The witness then
23 outlined the sources of such information as newspaper
24 articles, conversations held with various people, rumors,
25 and, in short, any information which might tend to

1 throw light upon the activities, in this instance, of
2 DOIHARA. After having received this information from
3 all the questionable sources named, he then stated
4 that he sifted the information and drew his own con-
5 clusions.^a

6 KUWAJIMA specifically mentions in his affi-
7 davit that the telegram in question^b was one of those
8 which had been compiled from information^c so obtained.
9 The conclusion of the prosecution^d that KUWAJIMA's
10 testimony was totally incredible because he had per-
11 sonally sifted information from whatever sources and
12 drawn his own conclusions, is in itself an incredible
13 conclusion on the part of the prosecution, because the
14 witness also stated that the sources of information
15 which he outlined were the only sources he had and
16 that with the great mass of information it was im-
17 possible for him to check the authenticity of such
18 sources; that he had to do the best he could under the
19 circumstances as he had no other personal information.^b

20 Although, as previously pointed out, the
21 prosecution quotes at length from the telegram in ques-
22 tion, it is noteworthy that they utterly failed to even
23 mention, much less quote, the portion of the telegram
24

25 a. Tr. 28,649, 28,650

b. Tr. 300. tr. 28Hq

a. Pros. sum. p. BB-14

b. Tr. 28,650

1 which substantiates the testimony of KUTAJIMA and so
2 we shall quote it:

3 "As in the last paragraph of my telegram
4 No. 743 to Bureau Chief TANI, the Chinese have been
5 concerned about DOHIHARA's intrigue since his arrival
6 in Tientsin. It may be for this reason that I believe
7 the recent riot is closely connected with him. I con-
8 clude that his movements hereafter require close atten-
9 tion."^a

10 There you have it in a nutshell. KUTAJIMA
11 himself did not know at that time why he believed
12 those things about DOHIHARA which he wrote in the
13 telegram, but he thought maybe he believed them simply
14 because the Chinese were perturbed. With this state-
15 ment in the telegram and with the testimony of KUTAJIMA
16 it can be readily seen that no court would accept the
17 telegram as evidence unless it be a court with extra-
18 ordinary powers, and certainly it should not be worthy
19 of consideration in a case of this magnitude.

20 The prosecution cannot be serious in their
21 contention that KUTAJIMA was telling an untruth about
22 the source of the information which comprised the tele-
23 grams which he sent because they had a witness MORISHIMA.

24
25 a. Ex. 300, tr. 4394-7

1 Morito, who was the First Assistant to the Consul
2 General and who stated in substance "that in order to
3 effectively perform the duties and functions of the
4 Consulate General's Office, they had to avail them-
5 selves of all accessible channels of information":
6 and he specifically states that it was the duty and
7 responsibility of their office to draw conclusions
8 from information so obtained and to advise the Japanese
9 Government.^b

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1 The testimony of MORISHIMA was given with ref-
2 erence to similar telegrams of the type mentioned by
3 KUYAJIMA. MORISHIMA was Assistant Consul General and
4 Acting Consul General from December 1931 to December
5 1932 at Mukden. It is true that he does state in his
6 affidavit that among the sources of information avail-
7 able to him was the Consular Police. We wish to dis-
8 cuss this and, in connection with the discussion, refer
9 the Tribunal back to the so-called secret investigation
10 which exhibit 300 mentions. It can be assumed that, if
11 the Consul General conducted an investigation, he would
12 do so through the Consular Police. For this reason it
13 is important to find out exactly how much faith could be
14 placed in the reports of the Consular Police. During
15 the cross-examination, the President of the Tribunal
16 asked the witness KUYAJIMA a question as to whether
17 the Consular Police were trustworthy men, and the
18 witness answered in substance that the Consular Police
19 brought much information to his office daily and it was
20 not to be trusted to the extent that it could be used
21 immediately for reporting purposes,^a and so, obviously,
22 no credit can be placed in this so-called secret
23 investigation. So much for prosecution exhibit 300.
24 We will now return to the prosecution summation where
25

1 the other telegrams in the series were introduced and
2 will analyze them in the same order as they appear in
3 the summation.

4 The first telegram in the series which the
5 prosecution cite is exhibit 288 and refers to the
6 alleged kidnapping of Pu-Yi by DOHIHARA. Since we
7 have already covered the general argument with refer-
8 ence to this situation fully, we will merely point out
9 that the telegram contains nothing except a condensation
10 of a published report of a telegram printed in a news-
11 paper. The exhibit itself starts with the words, "The
12 Chinese Newspaper of the 2nd inst. published a telegram
13 . . ." Further on in the body of the telegram we also
14 find these words, "The Newspaper said . . ." We submit,
15 in view of the origin of the information contained in
16 this telegram, that it has no probative value whatsoever.
17 The prosecution attempted to prove by the telegram that
18 DOHIHARA went to Tientsin on a secret mission, pointing
19 out that Pu-Vi testified he was annoyed by a series of
20 threats and that Goette testified that DOHIHARA was in
21 North China at the time a fruit basket containing a
22 bomb was sent to the home of Pu-Vi.^a This evidence is
23 so weak it does not even dignify a further analysis.
24

25 The next telegram which they cite is exhibit

a. T. 3729-3730.

1 286.^a The prosecution attempt to show by this telegram
2 that KUWAJIMA, Consul General in Tientsin, had previously
3 told DOHIHARA that the creation of an independent state
4 of Manchuria was contrary to certain provisions of the
5 Nine-Power Treaty.^b This telegram does not indicate
6 anything of the sort and is a telegram from Foreign
7 Minister SHIDEHARA to Consul General KUWAJIMA at
8 Tientsin in which SHIDEHARA outlines the position of
9 the Foreign Office and does not even mention DOHIHARA's
10 name.^c It merely reiterates what we already know and
11 that is that there was friction between the Foreign
12 Office and the Army with reference to the establish-
13 ment of the State of Manchukuo. In the telegram
14 SHIDEHARA cautions KUWAJIMA as follows: "Such being
15 the case, I ask you to keep the above well in mind and
16 do your utmost to stop the abduction of Emperor
17 Hsuan-Ung on one hand, and on the other hand, earnestly
18 propose to the Emperor in a suitable way to be prudent,
19 and I also ask you to be on guard."^d This paragraph
20 is significant. If the Foreign Office actually believed
21 that Pu-Yi was to be kidnapped, why then should KUWAJIMA
22 be enjoined to earnestly propose to the Emperor to be
23

24 a. T. 4356-8

b. Pros. Sum. F. BB-11

25 c. M. 4355

d. M. 4368

1 prudent? It is so significant that we ask the Tribunal
2 to pay particular attention to the fact that KUWAJIMA
3 was specifically enjoined to speak with the Emperor Pu-Yi.

4 The next telegram is exhibit 289. This one
5 refers to the preceding telegram and in it the Consul
6 General at Tientsin is reporting to the Foreign Minister
7 in Tokyo that he had attempted to persuade DOHIHARA to
8 their way of thinking but that DOHIHARA insisted on
9 several points, which we do not consider important
10 and therefore will not discuss at this time. However,
11 there are some portions of the exhibit which we should
12 like to call to the attention of the Tribunal concern-
13 ing conclusions which, according to the Consul General,
14 DOHIHARA had in mind. One of them concerned the
15 Emperor's apparent resolve to go to Manchuria at the
16 risk of his life.^a This is significant because it
17 indicates that nobody was about to kidnap Pu-Yi. Fur-
18 ther on in the telegram, the fact is recited that the
19 Consul General advised DOHIHARA that the army had better
20 give up its plan at least for the time being. The
21 Consul General then proceeds to state that DOHIHARA
22 did not accept his advice but expressed himself to the
23 effect that it should be clarified by sounding the
24 Emperor's mind, that if he (the Emperor had no intention
25

a. T. 4365

1 to run the risk, then he (DOHIHARA) would leave with a
2 parting remark that there would be no such opportunity
3 in the future for the Emperor, and would dispatch a
4 telegram to the military authorities at Mukden to the
5 effect that he would consider an alternative measure,
6 as the present plan was hopeless of success. This can
7 only mean one thing and that is that neither DOHIHARA
8 nor anyone else in the army had any idea of kidnapping
9 Pu-Yi; that the matter was in the hands of Pu-Yi himself.
10 This telegram bears out the overall testimony and is
11 not in the least inconsistent with the testimony of
12 Pu-Yi in regard to DOHIHARA.

13 The next telegram referred to is exhibit 290.
14 This telegram is supposed to refer to the conversation
15 DOHIHARA held with the staff of the Consulate. In read-
16 ing this telegram an entirely different light can be
17 placed upon its meaning than that advanced by the
18 prosecution. In their argument they state that DOHIHARA
19 pointed out to the staff of the Consulate that the state
20 of affairs in Manchuria was brought about solely by the
21 activities of the Chinese authorities and in case the
22 enthronement of the Emperor became indispensable in
23 order to save the situation, it would be outrageous for
24 the Japanese Government to take action to prevent it.
25

1 The telegram states that the Manchurian state of affairs
2 was brought to the present condition solely by the activ-
3 ities of the military authorities there and it does not
4 mention Chinese military authorities at all. It goes on
5 further to state that it would be outrageous for the
6 present government to take the attitude of preventing
7 it. Whether DOHIHARA was talking about Chinese troops
8 and the Japanese Government is not made clear. He does
9 point out that the situation was tense with the Kwantung
10 Army and we also find this statement contained in the
11 telegram: ". . . In Japan proper too besides the
12 assassination plotters who are now under confinement,
13 some graver accident may occur he feared."^a

14 This telegram again shows that DOHIHARA was
15 advising of the delicate situation and giving his
16 opinion as to what he feared might happen. In a previous
17 telegram of the series, as we have pointed out, he
18 already had stated that unless the Emperor voluntarily
19 came out and took the risk involved that he would advise
20 the Kwantung Army to the effect it was hopeless to
21 attempt to bring him out.

22 And again in this telegram, if it can be
23 believed at all, DOHIHARA predicated his actions on
24 the choice of Emperor Pu-Yi because we find these words:
25

a. T. 4367-8

1 "If the Emperor should decide to come out, he must be
2 brought out even if it depends on political expediency
3 as a means." Most of the rest of the telegram is merely
4 the opinion of the sender based obviously upon hearsay
5 and surmise.^a At the end of the telegram, the Consul
6 General tells the Foreign Office that with further
7 regard to the Emperor (Pu-Yi), he had repeatedly, through
8 Pu-Yi's attendants, given his advice to act with great
9 prudence and requested instructions from the Foreign
10 Office as to the degree to which he could speak to the
11 Emperor about the matter. This again shows that nobody
12 was about to kidnap Pu-Yi.

13 The next telegram concerns the alleged inter-
14 view which DOHIHARA had with Pu-Yi. This is exhibit
15 291.^b The information in this telegram is obtained from
16 two places, one from a secret conversation with an un-
17 identified person named Chiang Chui and another is from
18 the "Star," obviously a newspaper and consequently can
19 have very little, if any, probative value. However, it
20 is interesting to note that if DOHIHARA did talk to the
21 Emperor on this occasion, and we do not deny he did talk
22 with him on one occasion, the Emperor was in a very pleas-
23 ant frame of mind about the whole thing because the
24

25 a. T. 4368

b. T. 4373

1 telegram states in part, ". . . When former Emperor was
2 told restoration is welcomed by Japanese Imperial House-
3 hold, he seemed greatly willing, and expressed his desire
4 to know to what extent Japanese Government intends to
5 assist and also expressed his wishes to know details of
6 method of escape from here."^a This telegram, if it
7 proves anything, proves only that Pu-Yi was not the
8 subject of an abduction plot.

9 The next telegram is exhibit 292. Since the
10 Tribunal did not consider newspaper reports as evidence
11 in behalf of the accused except under certain special
12 conditions, we shall not discuss this telegram except
13 to state that it is a condensation of a news story report-
14 ed in the "I-shih-Pao," a Chinese newspaper.^b

15 The next telegram is exhibit 300, on which we
16 have already commented at great length, and the next
17 one is exhibit 294, a telegram in the same series giving
18 as the source for its information what the sender could
19 gather from the captain of a ship known as the "Awaji
20 Maru." Briefly, this deals with DOHIHARA's supposedly
21 guiding the former Emperor on his trip from Tientsin.
22 Since the prosecution themselves admit that DOHIHARA did
23 not accompany him on this trip^c it is hardly worth
24

25 a. T. 4374
 b. T. 4375
 c. Pros. Sum. P. DD-20

1 discussion. The whole telegram is based on hearsay and
2 there are several places in the telegram that disclose
3 the source of the information, such as the words, "...
4 is said to be engaged in plans," and "he is said to have
5 been." Obviously the sender was not certain of his infor-
6 mation.^a

7 The next telegram cited by the prosecution is
8 exhibit 297^b and concerns the Emperor Pu-Yi after he
9 left Tientsin and since it is admitted by the prosecution
10 that DOHIHARA had nothing to do with him at that time
11 there is no point in discussing it; and the next telegram,
12 exhibit 298^c is in the same category, and the same
13 applies to exhibit 302^d.

14 These are the only telegrams of any importance
15 dealing directly with the activities of DOHIHARA which
16 were cited by the prosecution. They do make reference
17 to telegrams concerning other people which have little,
18 if any, bearing on DOHIHARA, and therefore they do not
19 need any further consideration at this time.

20 The prosecution next proceed to what they term
21 DOHIHARA's undercover activities in the Tientsin area.^e
22 However, almost without exception they depend on the
23

- 24 a. T. 4379 - 4380
25 b. T. 4387-4388
c. T. 4390
d. T. 4400
e. Pros. Sum. P. BB-16.

1 series of telegram, most of which we have analyzed, and
2 others probably which they did not cite. Most of the
3 telegrams are nothing but newspaper reports and evidence
4 of similar character which throw little, if any, light
5 upon the alleged activities of DOHIHARA. The prosecution
6 assume that all the incidents in Tientsin were
7 engineered by DOHIHARA, but their own testimony contradicts
8 any such theory, especially with the so-called
9 terrorists' acts towards Fu-Yi. There is reason to
10 believe that much of the trouble was instigated by the
11 headquarters of the Iron Blood Group, a Chinese
12 communist party. The prosecution introduced into
13 evidence a telegram,^a which will bear out this belief.
14 It states, in substance, that several letters of threat
15 had been received by Fu-Yi from the headquarters of the
16 Iron Blood Group - a branch of the Chinese Communist
17 Party - and other anonymous persons.^b It appears
18 significant that although the prosecution introduced
19 that telegram they did not refer to it in their argument.
20 We do not believe that further discussion on this phase
21 is warranted or would be of benefit to the Tribunal and
22 we pass on to the next subject.

23
24 The prosecution have a sub-title which they
25 designate as "DOHIHARA's Control of Opium Traffic."^c

a. Ex. 296, T. 4384

b. T. 4385

c. Pres. Sum. p. BB-23

1 Without going into details, the Tribunal will recall
2 that the prosecution has laid stress on the fact that
3 others were in control of the opium traffic and conse-
4 quently the defense was rather surprised that, in
5 addition to all the other things which the prosecution
6 claims DOHIHARA was responsible for, they should also
7 include the opium traffic. However, the only period of
8 time that DOHIHARA could possibly have had anything to
9 do with the opium traffic was between the 18th of Sept-
10 ember 1931 and the 20th of October of the same year.
11 That was the period of time when he was Mayor of the
12 City of Mukden, and the only evidence contained in the
13 Record is that referred to by the prosecution^a having
14 to do with a telegram sent by Consul General HAYASHI to
15 Foreign Minister SHIDEHARA in which HAYASHI states that
16 according to reliable sources the municipal administr-
17 ation office planned the mobilization of opium. This
18 telegram was sent on October 13^b which was seven days
19 before DOHIRARA was relieved as the Mayor of Mukden on
20 the 20th of October.^c At the same time this telegram
21 was sent, or at least shortly thereafter, the prosec-
22 ution cite evidence which shows that DOHIHARA was not in
23 Mukden but that he was in Tientsin trying to abduct Pu-Yi^d

25 a. Pros. Sum. p. BB-24
b. T. 37,340

c. Ex. 57, p. 88
d. Pros. Sum. BB-9,
Tr. 15,726

1 and they also admit that he remained there until the
2 end of November.^a Consequently, DOHIHARA could have
3 had nothing to do with opium control. Even taking the
4 prosecution's viewpoint, which is entirely erroneous
5 and not consistent with the evidence, the best con-
6 clusion that could be drawn is that the control of
7 opium was in a planning period and there were actually
8 no operations at that time. To state that DOHIHARA
9 controlled the opium traffic is entirely unwarranted
10 by the evidence. Actually, the plans, if any there
11 were, were but the materialization of a part of the
12 plans of the army which plans were marked secret No.
13 781 as of October 2 of that year.^b At other places
14 in the summation, we have discussed at length the
15 "reliable sources" which consul generals were send-
16 ing to the Foreign Office. Actually such so-called
17 "reliable sources" were the most unreliable that could
18 be conceived of under the circumstances. The prosec-
19 ution's assertion that MINAMI's testimony that DOHIHARA
20 had nothing to do with the problems such as opium and
21 was only an attempt to whitewash DOHIHARA^c is uncalled
22 for and is not justified by the Record. Their reference
23 to the fact that MINAMI testified that one of the reasons
24

25 a. Pros. Sum. p. BB-20

b. T. 37,340

c. Pros. Sum. p. BB-24

1 for abolishing the Special Service Department might
2 have been because it was running the opium traffic for
3 its own personal benefit^a has absolutely no relation
4 to DOHIHARA. That incident occurred, as will be shown
5 by our further summation, more than two years later at
6 a time when DOHIHARA was not connected with Special
7 Services.

8 Since the prosecution, as we have already stated,
9 surprised the defense by attempting to accuse DOHIHARA
10 of having controlled the opium traffic, we have no choice
11 except to thoroughly analyze the testimony in addition
12 to answering the prosecution's argument. As we have
13 pointed out, and this date is not contested, DOHIHARA
14 first appears on the scene, insofar as this case is con-
15 cerned, as the Head of the Special Services Organization
16 in Mukden on or about August 15, 1931.^b During that
17 period of time opium control is out of the picture
18 although the testimony of the star witness for the
19 prosecution, one General TANAKA, would seem to indicate
20 that it was not. However, we shall not quote from his
21 testimony at this time because it is sufficient to state
22 that his recollection of dates and events is not infall-
23 ible and that he did make mistakes. We shall later
24

25 a. Pros. Sum. p. BB-24
b. Ex. 57, p. 88

1 summarize those portions of his testimony which we feel
2 may be relevant to the issues. Because of TANAKA's
3 testimony, the dates that DOHIHARA held various positions
4 becomes of great significance with reference to the opium
5 question. Some of these dates are not contested by the
6 prosecution. However, we consider it necessary to bring
7 all the dates in question to the attention of the
8 Tribunal in order that a full and clear mental picture
9 of the entire situation may be formed.

10 The prosecution introduced a small part of the
11 interrogation which they took from DOHIHARA at the time
12 they were preparing their case, and have attempted to
13 show inconsistencies in it, apparently because at the
14 outset he did state that the first time he went to
15 Manchuria was August 15, 1931.^a This particular portion
16 of the interrogation was taken on 11 January 1946 and
17 at a later time, in February 1946, additional interroga-
18 tions were taken, at which time DOHIHARA was reminded
19 that he had said that the first time he went to Manchuria
20 was on August 15, 1931.^b DOHIHARA admitted frankly
21 that he had said so but stated that actually he was
22 mistaken as to the date, the actual date being August 18,
23 1931. He also stated that he had been in Manchuria once
24 in 1911 and once in 1929.^c Why the prosecution settled
25

a. T.15,713.

b. T.15,721.

c. T.15,721

1 on such understandable inconsistencies when those
2 inconsistencies could have no possible bearing upon the
3 guilt or innocence of the accused is quite beyond the
4 comprehension of defense counsel. However, it does
5 demonstrate the extreme lengths the prosecution has
6 been forced to in an attempt to prove their case.
7 Common sense dictates that the only date we are actually
8 concerned with is when did DOHIHARA go to Manchuria in
9 1931. As to whether it was the 15th or the 18th of
10 September is of slight consequence, but in the event
11 importance be attached to that a perusal of the Record
12 containing DOHIHARA's interrogations^a will show that
13 the error, later corrected, was a natural one. The
14 order appointing DOHIHARA as the head of the organiza-
15 tion was August 15 but he did not actually arrive there
16 until August 18, hence the discrepancy. According to
17 the testimony of TANAKA,^b DOHIHARA was placed in charge
18 of the Special Services Organization and remained the
19 head of that organization down to the time when the
20 control of opium was transferred. This statement is
21 absurd on its face and we know it is not true because
22 even the prosecution do not contest the fact that
23 DOHIHARA was relieved of the job when he took over as
24

25 a. T. Mon. 20 Jan. '47; Tues. 21 Jan. '47

b. T. 15,857

1 Mayor of Mukden. There is no contest on the fact that
2 DOHIHARA had been in Tokyo and was on his return to
3 Mukden at the time the Mukden Incident occurred and
4 upon his arrival was immediately made the Mayor of that
5 city. This occurred immediately after September 18,
6 1931.^a DOHIHARA did not again head the Special Services
7 Organization in Mukden until July 1934. However, by
8 that time the control of opium had been removed from
9 the Special Services Organization and was under a
10 specially created board. We shall now proceed to the
11 discussion of the setting up of that board and to a
12 further analyzation of the evidence which will prove
13 conclusively that General DOHIHARA never had anything
14 to do with opium control.
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a. T. 15,714, Ex. 57, p. 88

1 We have already made reference to the testi-
2 mony of the witness TANAKA concerning DOHIHARA's con-
3 nection with opium, but it is necessary to further
4 analyze his testimony in connection with other and
5 better informed witnesses. As the Tribunal will re-
6 call, the witness TANAKA testified on so many sub-
7 jects that he might well be termed a self-styled
8 walking encyclopedia on contemporary Japanese history.
9 This remark is made in order to recall to the court's
10 attention the literally hundreds of instances he tes-
11 tified to from memory alone. With reference to DOHI-
12 HARA, he stated, in substance, that DOHIHARA was the
13 head of the Special Services Organization in Mukden
14 when the Manchurian Incident broke out but that for a
15 short time, someone he did not remember occupied the
16 position, and then again DOHIHARA became the head of
17 that organization and continued right down to the time
18 when the control of the opium traffic was transferred.
19 This statement was made on direct examination at which
20 time he also stated that General DOHIHARA was the head
21 of the Special Services Organization in Southern
22 Manchuria. Reference is made to this last statement
23 of the witness TANAKA because of the fact that it had
24 been made to appear that the Special Services Organ-
25 a. T. 15,857

1 ization in mukden was a wide-flung organization with
2 a great deal of power over large sections of Manchuria.
3 This we know was not true. On cross-examination we
4 elicited from the witness the fact that he was in
5 error. We first reminded the witness of his testi-
6 mony, given the previous day, concerning the fact he
7 had stated that DOHIHARA was the head of the Special
8 Services Organization in Manchuria at the time of the
9 outbreak of the Manchurian Incident and asked him if
10 he desired to change his statement. Upon objection
11 from the prosecution that we were misquoting the
12 Record, we then read the Record word for word. There
13 could be no possibility of a misunderstanding upon the
14 part of the witness. And when we again asked him if he
15 desired to change his answer, the witness replied, "I
16 am ready to change it."^a The witness then went ahead
17 to explain that inasmuch as the Chiefs of the Military
18 Services Departments were in charge of small local areas
19 he had said that the accused DOHIHARA was in charge of
20 the Special Services Department in Southern Manchuria
21 or Mukden.

22 The prosecution apparently relied upon the
23 witness TANAKA to tie DOHIHARA into the opium question
24 by the testimony just referred to. However, by the
25 a. T. 15,921

1 witness' own testimony the position which DOHIHARA
2 held, if he held it, even at the time the witness said
3 he did, would preclude him from being in control of
4 opium in Manchuria. At best his jurisdiction was,
5 according to the witness, a small local area. To be
6 perfectly fair with TANAKA, he stated, in substance,
7 that if his recollection was not mistaken, General
8 DOHIHARA was the Chief of the Special Services De-
9 partment at the time of the outbreak of the Manchurian
10 Incident and after that he once returned to Japan and
11 then went back to Manchuria in December; as near as
12 the witness could recall -- December 1934 -- as Chief
13 of the Special Services Department. He further stated
14 that if there was any mistake in his memory he should
15 be glad to change it.^a

16 Further questioning of the witness elicited
17 the fact that he thought that the Opium Control Board
18 was put into effect on January 11, 1933 but that the
19 actual completion of the Opium Control Board took
20 place in April 1935. It is patent the witness was
21 relying on his memory entirely and could equally be
22 mistaken, which fact he admits. He once stated: "I
23 think I am right."^b

24 a. T. 15,923
25 b. T. 15,927

1 THE PRESIDENT: We will adjourn until nine-
2 thirty tomorrow morning.

3 (Whereupon, at 1600, an adjourn-
4 ment was taken until Tuesday, 16 March,
5 1948, at 0930.)

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